

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

PERSONAL AUDIO, LLC		DOCKET 9:09CV111
		JUNE 27, 2011
VS.		1:00 P.M.
APPLE, INC., ET AL		BEAUMONT, TEXAS

VOLUME 3 OF __, PAGES 660 THROUGH 888

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE RON CLARK
UNITED STATES DISTRICT JUDGE, AND A JURY

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1 (REPORTER'S NOTES PERSONAL AUDIO V. APPLE,
2 JURY TRIAL, VOLUME 3, 1:00 P.M., MONDAY, JUNE 27, 2011,
3 BEAUMONT, TEXAS, HON. RON CLARK PRESIDING.)

4 (OPEN COURT, ALL PARTIES PRESENT, JURY NOT
5 PRESENT.)

6 THE COURT: Let's go ahead, then, and -- I
7 hope everybody had a good weekend.

8 MR. HOLDREITH: Judge, can I just mention
9 there are a couple demonstratives in my set that
10 Mr. Stephens advised me he still has an objection to? I
11 don't know if the court's rulings on Friday cover those
12 or not. I won't get to those until later this afternoon;
13 so, they will not come up in the first hour of testimony.

14 THE COURT: Okay. You're talking about
15 Demonstratives 1059 and 1060?

16 MR. HOLDREITH: Yes, sir.

17 THE COURT: And I guess 1062?

18 MR. STEPHENS: That's correct, your Honor.
19 1059, 1060, 1062 --

20 THE COURT: And the concern with 1059 is?

21 MR. STEPHENS: They improperly characterize
22 claim limitations by using an abbreviated word or two to
23 represent an entire limitation. If they wanted to say,
24 you know, "limitation 1B" or something like that, we
25 don't have a problem with the rest of it. It's just if

1 you say, for example, infrared is a shorthand for the
2 structure that corresponds to the means for language,
3 that's going to be misleading.

4 THE COURT: Might possibly make it easier for
5 the jury to understand if you had the 1B. I'm going to
6 overrule as far as the shorthand because this is a
7 demonstrative. But Mr. Stephens is correct it might be a
8 little easier if you put the claim number or sub-number
9 next to the shorthand so people would know, yeah, that's
10 the 1B thing. We've got a shorthand here for them.

11 MR. HOLDREITH: That's an excellent
12 suggestion, your Honor. I'll try to write that in.

13 THE COURT: I will sustain in that it would be
14 more clear than it was. Since it's a chart like this and
15 a demonstrative, I'm not going to require them to try to
16 put the entire claim term there.

17 Okay. What about -- is that the same for 1060
18 then?

19 MR. STEPHENS: Yeah. It was the same
20 objection for all of those, your Honor.

21 THE COURT: All right. Well, the ruling will
22 be the same on all of them.

23 MR. STEPHENS: There were a couple of other
24 issues. I don't know if your Honor was --

25 THE COURT: Okay.

1 MR. STEPHENS: So, there are some exhibits
2 that refer to *iTunes* and the *iTunes* Web site --

3 THE COURT: Okay.

4 MR. STEPHENS: -- they attempt to use, and we
5 think it's inappropriate for Dr. Almeroth to testify
6 about *iTunes* and *iTunes* Web site while he's talking about
7 infringement.

8 THE COURT: All right. And as stated on my
9 ruling on the motion *in limine*, it will stand on that.

10 MR. STEPHENS: Okay.

11 THE COURT: Same basis.

12 Go ahead and bring in the jury.

13 (The jury enters the courtroom, 1:00 p.m.)

14 THE COURT: Good afternoon, ladies and
15 gentlemen. Welcome back. Last night, about 7:00, we
16 were over at a friend's house, my wife and I; and she
17 suddenly collapsed, passed out. We thought at first it
18 might be a heart attack or stroke. We took her down to
19 the emergency room. They did a bunch of tests. They now
20 think it was probably some kind of atypical migraine
21 attack. She's had migraines in the past but never
22 anything like this. All of the tests came back not being
23 heart attack or stroke. I apologize for the delay. I
24 was used to hurricanes causing delays, which is why we
25 wanted your phone number. Hopefully you all got your

1 calls so you didn't have to come down here this morning.

2 Also, fortunately we had enough time built
3 into the schedule that if we keep moving right along, I
4 still think the evidence will be wrapped up -- it will be
5 a little later in the day but on the same as we talked
6 about before.

7 Let me mention two things. We're going into
8 this infringement analysis. Remember that in the end
9 you're going to be looking at the claims that you're
10 given -- and I'll give those to you in the
11 instructions -- and you will compare those against the
12 accused products, in this case these various versions of
13 the iPod.

14 Now, you're going to hear evidence about other
15 things, for example, *iTunes* and some of the other things
16 will be talked about because they're related to it; but
17 those aren't related products. So, that's not part of
18 the infringement.

19 And you're also going to see some charts
20 showing some shorthand in the chart of what the claim is,
21 for example, like claim 1B -- or 1B of a claim. Keep in
22 mind that you won't be looking at the shorthand; you'll
23 be looking at the claim language itself to see whether
24 that's contained in the iPod you're looking at, for
25 example.

1 But on the other hand, if you had to read out
2 all of this language every single time someone mentioned
3 it, this would go on forever.

4 The other thing is you've heard and you'll
5 probably continue to hear that, for example, the people
6 at Personal Audio had a lot of different patents. The
7 people at Apple have a lot of different patents. Whether
8 or not somebody has a patent in the past doesn't make
9 this patent or these two patents or the claims in these
10 two patents good or bad. Apple can have a patented
11 product if other elements are patented and it can still
12 infringe. Mr. Logan can have patents and they were good
13 patents and you could find that these particular patents
14 or a claim -- any one or all of the claims were invalid.
15 So, don't get too carried away about the idea that people
16 have patents in the past or people have patents now.

17 Now, there is going to be some argument about
18 the fact that if something is patented it can't be what's
19 called "equivalent." And they'll get into that later.
20 But don't focus in on, "Oh, gee, they're patented" or "He
21 has patents" or count up "Well, this expert has 32
22 patents and that expert only has 28 patents." That's not
23 how this goes. You're looking at the claim language.
24 You compare that with the accused products. And when
25 they get to what's called "invalidity," when Apple is

1 saying the patent is not valid, you're going to be
2 looking at the claim language and you're going to see if
3 it was not new or if it was obvious or if it didn't meet
4 a written description.

5 I'll give you some clear instructions on that.
6 I'm just giving you a little warning about don't get
7 caught up in what the lawyers and judges use as shorthand
8 or an easy way, well, let's just count up how many
9 patents there are on each side and they win. That's not
10 how it works.

11 Go ahead, counsel.

12 MR. HOLDREITH: Thank you, your Honor.

13 CONTINUED DIRECT EXAMINATION OF
14 KEVIN C. ALMEROTH

15 BY MR. HOLDREITH:

16 Q. Dr. Almeroth, as we left off on Friday and as the
17 judge was just instructing, your job is to analyze the
18 iPods sitting in front of you like the claims that are on
19 this Demonstrative Exhibit 1011. And is that what you
20 did?

21 A. Yes, sir.

22 Q. Now, Dr. Almeroth, when you looked to see if those
23 iPods had everything listed in this claim, for example,
24 did you notice that they have other things as well that
25 aren't on this list?

1 A. Yes, sir, I did.

2 Q. For example?

3 A. The iPods have some additional functions, a clock
4 and a calendar, notes that you can take and contacts you
5 can have. There are even some games on some of the
6 iPods. So, there are other things on the iPod that
7 aren't related to this claim.

8 Q. And how does it factor into your analysis of
9 infringement that iPods have some other things that are
10 not in this claim?

11 A. It doesn't factor into my analysis. My job was to
12 find these limitations in the iPod. If there was other
13 things, that doesn't make a difference with respect to
14 matching up these claims and these limitations with
15 what's in the device.

16 Q. So, Dr. Almeroth, if one iPod could store ten
17 songs or a hundred songs or a thousand songs, does that
18 make a difference to your infringement analysis?

19 A. No.

20 Q. Why is that?

21 A. Because a requirement to store a certain number of
22 songs is not listed up there on the board and is not part
23 of the judge's construction. That's not a test for
24 whether or not this device infringes or not.

25 What color the device is, what size it is,

1 those are not things with respect to claim 1 that have to
2 be evaluated and have to be present to infringe this
3 claim. It really is just those specific things on the
4 board.

5 Q. And does it have to be able to store some songs?

6 A. Yes. There will be limitations. We've talked
7 about that in the context of the patent. But there are
8 the things on the board -- it does have to store songs,
9 yes.

10 Q. So, is it the number of songs that's not required?

11 A. That's correct.

12 Q. Okay. And what if an iPod can download songs
13 really, really fast? How does that factor into your
14 analysis?

15 A. The fact that it's fast or really fast or
16 superfast or kind of slow, those aspects don't matter
17 when it comes to determining infringement. It just has
18 to be able to -- for some of the claims to be able to
19 download and transfer those songs onto the device.

20 Q. And how about -- there was some testimony about
21 this wheel or scroll -- Clickwheel on the iPods. How
22 does that factor into your analysis?

23 A. The same way. There has to be -- for example, on
24 the board with 1C, there has to be a means for accepting
25 control commands. The court has identified a couple of

1 ways that you can do that, but whether it's a Clickwheel
2 or some other kind of method doesn't matter.

3 Q. All right. There was some testimony during
4 Mr. Call's examination about bells and whistles. Were
5 you present for that?

6 A. Yes, sir.

7 Q. Does this have anything to do with bells and
8 whistles?

9 A. It's related to bells and whistles. The patent
10 describes a number of different inventions, and it
11 describes some extra features that can be considered as
12 part of other claims. But when it comes to this claim,
13 this claim will be the boundary for defining what
14 infringement is and it's really about this claim, these
15 limitations and then these devices.

16 Q. All right. Dr. Almeroth, I'd like to turn now to
17 how you did your analysis. And that includes what types
18 of information you had available to examine and some of
19 the things that you studied to try to figure out if the
20 iPods have the limitations in the claim. All right?

21 A. Yes.

22 Q. Let's start by asking: Did you prepare an index
23 showing some of the technical documents that you looked
24 at?

25 A. Yes, I did.

1 Q. And just very generally, where did you get these
2 technical documents?

3 A. These technical documents were produced by Apple.
4 As part of this case they have to prove documents that
5 are relevant; and, so, many of these documents on this
6 list came from Apple directly.

7 Q. All right. Dr. Almeroth, I'm now showing you
8 Plaintiff's Exhibit 748A. What is this?

9 A. This is a list of that summary of technical
10 documents.

11 Q. And who prepared this?

12 A. I did.

13 Q. This document has a title. It's a little hard to
14 read. Can you explain what the title is?

15 A. Yes. There are a number of pages to this
16 document, and on each page there is documents provided
17 for each of the 13 devices. There are some groupings as
18 we've discussed before. But all of the documents broken
19 down by the generations are on this and subsequent pages.

20 Q. So, page 1 is the classic Generation 1; and, for
21 example, page 2 is?

22 A. Classic Generation 2. The next one, classic
23 Generation 3, then 4, then 5, et cetera.

24 Q. Okay. And within Exhibit 748, do you have a list
25 of technical documents that describe each of the iPods

1 that you analyzed?

2 A. Yes, sir.

3 Q. All right. Let's walk a little bit through what
4 some of those documents are. We'll use the classic 3 as
5 an example. And we'll get into some of these documents
6 in detail as we go. Right now I'd just like you to
7 introduce them.

8 Let me ask you, first of all, about the
9 physical devices. Did you also look at all the physical
10 devices?

11 A. Yes, sir. Those are up here on the railing, and
12 then I can also demonstrate some of them later.

13 Q. And I'm showing you now Exhibit 744. Is this an
14 index you prepared of the iPods that you examined by
15 number?

16 A. Yes, sir, it is.

17 Q. And there are some numbers along the column there,
18 like PX-50 and PX-186. Can you explain what that is?

19 A. Yes. Those are the exhibit numbers. And I think
20 there is a typo in there. The first column should be DX.
21 Those represent these 13 devices, and they all became a
22 defendant's exhibit. So, you have -- actually, no, I'm
23 sorry. Right. So, that's correct.

24 So, for some of these I had access to multiple
25 devices.

1 Q. Okay. So, for example, do you have one of the
2 devices that's on this list right there in front of you?

3 A. Yes. For example, the iPod classic third
4 generation, this is one (indicating); and on the back
5 it's PX-187.

6 Q. And, so, does this list help you figure out which
7 of the iPods you looked at and what trial exhibit number
8 they are?

9 A. Yes, sir.

10 Q. All right. Let's look at the documents now. And
11 I'm showing you again Exhibit 748A, page 3 for the
12 classic 3. Does this use exhibit numbers the same way?

13 A. Yes, it does.

14 Q. Okay. And what is listed next to each of the
15 exhibit numbers? For example, PX-108 says it's the iPod
16 classic third generation user guide. What are you
17 indicating there?

18 A. That's the title of the document. So, the first
19 one on the list, the 108, is the user guide that comes
20 with this classic 3.

21 Q. And did you have user guides like this for all of
22 the devices that you looked at?

23 A. Yes, I did.

24 Q. So, for example, if we look at the previous page
25 of Exhibit 748, page 2, this is for which device?

1 A. This is for the classic Generation 2.

2 Q. And did you list a user guide for this one?

3 A. No. I didn't for this one because it's basically
4 the same as a classic Generation 1.

5 Q. And if we look at the classic Generation 1, the
6 first page of Exhibit 748, did you list a user guide
7 here?

8 A. Yes, I did.

9 Q. And is that the same user guide as for the
10 classic 3?

11 A. It's similar, but there are separate documents
12 because they apply to the different devices. So, I
13 listed both of them.

14 Q. Just to make that clear, the user guide for
15 classic 1 is what exhibit number?

16 A. 112.

17 Q. 112. And if we go to the classic 3, the user
18 guide is what exhibit number?

19 A. Exhibit 108.

20 Q. All right. Let's look at that user guide,
21 Exhibit 108. I'm now showing you the first page of
22 Plaintiff's Exhibit 108. Can you explain what this is?

23 A. This is the user guide -- it's a little hard to
24 show up. Thank you for blowing it up.

25 It's the user's guide. It comes with a

1 device. It comes with a little booklet, and it has a
2 bunch of pages that relate to teaching a user how to use
3 an iPod.

4 Q. Is this information that Apple provides to the
5 public somehow?

6 A. Yes, it does.

7 Q. How do they do that?

8 A. In the case of this user guide, it was packaged
9 with the iPod.

10 Q. What kind of information is contained in the user
11 guide?

12 A. It tells you, for example, getting started, what
13 you need to connect the communication port on this device
14 to receive songs and playlists. It tells you about the
15 buttons. It tells you about charging the device,
16 troubleshooting, all the things that a user has to know
17 to take advantage of the functions of this device.

18 Q. All right. Now turning back to Exhibit 748, the
19 index for the classic 3, the next line talks about an
20 iPod classic 3 online technical specification, which is
21 Exhibit 305.

22 A. Yes.

23 Q. I'm going to show you that. Can you explain what
24 kind of information is contained in a technical
25 specification?

1 A. This has specifications, details about some of the
2 components in the device, from the kinds of storage it
3 has to the kinds of power that it has; and it's about
4 three pages long and lists some of the details that --
5 the more technical aspects of the device.

6 Q. Now, this says "N₃" up here. What does that mean?

7 A. That's the third generation of the iPod classic.

8 Q. Is this a public document that Apple provides to
9 the public?

10 A. No. This is available internal only to Apple.

11 Q. And is this a confidential document?

12 A. Yes, it is. It says so in the lower left corner,
13 "confidential."

14 Q. That's down here (indicating).

15 A. Yes.

16 Q. And we'll get into this in a little bit more
17 detail; but just as a quick tour, you mentioned this
18 describes storage?

19 A. That's right.

20 Q. Is that something that will be important to your
21 analysis?

22 A. Yes, it will.

23 Q. And what under the "storage" line are the kinds of
24 things we'll be looking at?

25 A. It talks about the kind of storage, the fact that

1 it has RAM.

2 It talks about the type of persistent mass
3 storage it has here. In this case it's a hard disk
4 drive.

5 The first line is about the capacity. It
6 talks about the size in gigabytes, which roughly
7 translates to a number of songs that the device can
8 store.

9 Q. And is this indication of connectivity something
10 we'll be talking about?

11 A. Yes. It also talks about the kind of
12 communication port that's on the bottom of this device
13 and the kind of protocol that you can use to communicate
14 and receive information.

15 Q. Did you have technical specifications like this
16 for all 13 of the iPods that you examined?

17 A. Yes, I did.

18 Q. Notice this document also has a reference to a
19 headphone port. Is that something that's also going to
20 be important to your analysis?

21 A. Yes. A document like this and others on the list
22 help build a picture for the kinds of things that I need
23 to reach a conclusion about whether it infringes or not.

24 Q. All right. Returning now to your index, just
25 under the document we just looked at, the technical

1 specification that's Plaintiff's Exhibit 305, there is a
2 Plaintiff's Exhibit 304, a product specification?

3 A. Yes.

4 Q. Let's look at that. It looks very similar. What
5 is this?

6 A. It does. It's a product specification. This one
7 is a little bit longer. It's about four pages. But much
8 of the information is the same, again more specific
9 details -- clearly more specific details than what are in
10 a user guide about kinds of components and what their
11 capabilities are on the device.

12 Q. This indicates that there are some things in the
13 box. Is that something you considered?

14 A. Yes, it is.

15 Q. And what does that mean?

16 A. Some of those things that are in the box -- for
17 example, the earbuds, those are headphones. And it also
18 talks about the kind of cables that there are that will
19 attach to the bottom of this device. That's all
20 information that's relevant in my opinion.

21 Q. And did you find that all of the iPods come with
22 earbuds and with a cable for connecting?

23 A. Yes, sir.

24 Q. Let's go now back to your index. The next kind of
25 document on the list is a hardware specification, and

1 there are two lines for the hardware specification.
2 They're Plaintiff's Exhibit 329 and Plaintiff's
3 Exhibit 71. What kind of information is in those? I'll
4 pull up 329.

5 A. Those are documents that provide even more
6 lower-layer detail about the device. They go into some
7 of the specific components that are in the device.

8 This first one is about the Q14 Buster.
9 Q14 -- each of the devices has an internal code name for
10 it. In the case of the classic 3, it's Q14. They
11 usually use a letter and then a two-digit number. So,
12 each of these 13 devices has one of these code names.

13 And then this describes then the hardware
14 specification. If you advance forward a couple of pages,
15 for example, there will be details on the types of
16 components. Here is a table, for example, summarizing
17 some of the hardware components that are in this device.

18 When you blow it up -- so, for example, the
19 hard drive is from a company called "Toshiba." Now we're
20 starting to look at additional details about the device.
21 It talks about the battery, and that's from a company
22 called "LG." Then there's also NEC. And then there's
23 also -- for example, you get to the level of detail where
24 you have this battery pack insulating tape, and I'm not
25 even going to try and pronounce the company that that's

1 from.

2 But this hardware guide will start to lay out
3 some of the specific details of the things that are in
4 this device.

5 THE COURT: Counsel, just to remind you, when
6 you're going through the index, you're saying that it's
7 plaintiff's exhibit. When you're talking about what's on
8 the screen, you're just using a number. But just for
9 record purposes, so far everything you've shown up on the
10 screen so far this afternoon has been a plaintiff's
11 exhibit?

12 MR. HOLDREITH: Yes, sir.

13 THE COURT: Okay. If you'll remember -- and
14 I'll try to remind you -- when you're talking about the
15 ones that are up, as you show the exhibit, plaintiff's or
16 defendant's exhibits. We've got hundreds of each.

17 MR. HOLDREITH: I apologize for that; and just
18 for the record, I'll read them right now. The ones we've
19 discussed so far are PX-108, PX-305, PX-304, PX-329, and
20 PX-325.

21 BY MR. HOLDREITH:

22 Q. All right. Dr. Almeroth, returning to your index,
23 underneath the hardware specification there is
24 Plaintiff's Exhibit 325, a bill of materials report.
25 What is a bill of materials report?

1 A. The hardware specification guides were one level
2 of detail, and now we're going even further. This is
3 about a 34-page document that lists, in very careful
4 detail, all of the specific parts that are in there, down
5 to some of the smallest components in the device.

6 This kind of document is useful because it
7 tells you manufacturer, part number, component
8 information, size, shape, a lot of different details
9 about everything that's in one of these devices.

10 Q. And did you have bills of materials reports for
11 all of the devices you examined?

12 A. Yes, sir, I did.

13 Q. Did you study them to find information in them to
14 help inform you as to whether those devices have parts
15 that correspond to the claim?

16 A. Absolutely.

17 Q. All right. Dr. Almeroth, the next type of
18 document in your guide is a chip schematic, Plaintiff's
19 Exhibit 89. What is a chip schematic?

20 A. I don't think we're going to go into lower than a
21 chip schematic. That has all of the specific chips, how
22 they are laid out on the boards, how those things are
23 connected together. If you've ever seen a circuit board,
24 it has the square and rectangular chips; and then you can
25 sometimes see the wires that connect all those chips

1 together. This is a kind of hardware specification that
2 does the exact same thing.

3 With this kind of detail, you can tell how
4 each of the parts of the chip connects to other parts of
5 other chips. There are references on these chips to
6 their manufacturer number. You can cross-reference that
7 with a bill of materials, build that back up into the
8 hardware specification, and eventually back up into the
9 user guide to see how these devices work top to bottom
10 and outside to in.

11 Q. Dr. Almeroth, are you able to look at a diagram
12 like this and to read and understand what it's saying?

13 A. Yes, sir.

14 Q. Did you have chip schematics for all of the iPod
15 devices that you examined?

16 A. I did.

17 Q. I just want to return to the first page that's got
18 some text on it. What is this?

19 A. This is a table of contents for the pages, the 13
20 pages that are in this chip schematic. And you can see
21 from some of the items on here it talks about the memory.
22 It talks about the hard disk drive. It talks about
23 FireWire and USB, the audio -- digital audio converter,
24 then the headphones, the dock connector which will be the
25 controller on the bottom there. There are pages -- I'm

1 sorry, and I missed at the top the CPU. There are pages
2 in this that talk about the chips and the connections
3 that all of these devices have that are internal to the
4 device.

5 Q. All right. And, Dr. Almeroth, is the -- what is
6 this component, "audio DAC"?

7 A. That's the digital audio converter. What that
8 tells you is -- or what it provides is the ability to
9 take the songs that are stored on the disk digitally and
10 then convert them into analog and be able to play them
11 out, and that's why it's on the same page as the
12 headphone amp. There has to be a small amplifier so that
13 you can plug in an earbud or headphones and hear the
14 music come out.

15 Q. Is that something we'll be coming back to?

16 A. Yes, sir.

17 Q. There is something here that says "CPU." Is that
18 related to the processor?

19 A. That's right. The "CPU" stands for "central
20 processing unit," and the P5002 is the model number of
21 the CPU that's inside this classic 3.

22 Q. All right. Dr. Almeroth, returning now to your
23 index, Plaintiff's Exhibit 161 is something about *iTunes*,
24 as is Exhibit 334. Why were you looking at *iTunes*
25 documents?

1 A. *iTunes* documents tells me about the kinds of
2 things that can happen in *iTunes*. Now, as it relates to
3 an iPod, you have to receive songs and playlists from
4 somewhere. And what's important about this device is
5 that it has the capability and that it's specifically
6 programmed to get those things from outside into the
7 device.

8 Now, it doesn't necessarily matter where they
9 come from; but *iTunes* is evidence that this device has
10 the capabilities that are listed on this panel.

11 Q. Let's be clear. Is *iTunes* or the *iTunes* store
12 something that you're accusing of infringement here?

13 A. No, sir, I'm not.

14 Q. Dr. Almeroth, the next thing on this list is
15 something called "Defendant Apple's Sixth Amended
16 Objections and Responses to Plaintiff Personal Audio,
17 LLC's, Interrogatory Number 11."

18 And there is another one that is an answer to
19 Interrogatory Number 10. What does that mean?

20 A. These are documents that contain answers to
21 questions. Personal Audio, as part of this case, was
22 able to ask Apple questions in writing; and Apple
23 provided responses to those. Those are called
24 "interrogatories." And these plaintiff's exhibits are
25 references to those interrogatories, and those contain

1 particular questions and answers that were relevant to my
2 analysis.

3 Q. And did you review those interrogatories,
4 Numbers 11 and 10, and the responses; and did they
5 provide information that informed your opinion?

6 A. Yes, they did.

7 Q. Okay. Let's just look quickly at Plaintiff's
8 Exhibit 625. Is this one of those two documents?

9 A. Yes, it is.

10 Q. And turning to page 14 of Plaintiff's Exhibit 625,
11 could you just explain -- did you get the information for
12 all of the devices that you examined?

13 A. Yes. Generally the answers provided by Apple were
14 broken down into different devices, into these different
15 generations and families.

16 Q. If we look at that answer for a minute -- is it on
17 the next page?

18 A. Yes, sir.

19 Q. What is the question that was being answered in
20 this interrogatory?

21 A. It talks about -- this is a document relating to
22 the source code, to the software algorithm. And this
23 says, "For versions of the iPod application on the iPod
24 classic Generation 3, source code implementing the
25 corresponding software or algorithm that allows a user to

1 navigate forward in a playlist of songs is described as
2 follows."

3 So, that was in response to a question that
4 was asked by Personal Audio. That's the first paragraph,
5 and the rest of this page has information about the
6 algorithm that Apple uses. And I used this page for this
7 device and this page -- or similar pages for the other
8 devices as part of forming my opinion with regard to
9 infringement.

10 Q. Does this answer describe how source code works in
11 the iPod? Is that what it is?

12 A. That's correct, how the source code works; and it
13 points to particular source code functions and particular
14 files and how the source code works.

15 Q. Now, Dr. Almeroth, in addition to answering the
16 question about an algorithm that allows a user to
17 navigate forward, does this interrogatory provide
18 information about another algorithm?

19 A. Yes, it does. It also talks about the "back"
20 command, to skip backwards. And that's -- it's very
21 similar language until you get to the end of the second
22 line, "allows a user to navigate backward in a playlist
23 of songs."

24 Q. All right. Dr. Almeroth, notwithstanding that you
25 had these answers from Apple, did you also look in the

1 source code for yourself to understand what the
2 algorithms are that the iPod uses?

3 A. Yes, I did. There is a source code computer that
4 has all of the source code related to these devices. I
5 looked at all of that source code as well.

6 What these documents do is provide information
7 and backups to that information and source code and
8 documents that allow me in multiple different places to
9 find each of the elements on this chart.

10 MR. HOLDREITH: Now, your Honor, we're about
11 to introduce an exhibit which reproduces a portion of
12 Apple's source code, as does this answer. I understand
13 that the exhibits will be sealed but Apple has not asked
14 for the courtroom to be cleared and the parties will work
15 out sealing the exhibits after court.

16 THE COURT: Is that correct?

17 MR. STEPHENS: That's correct.

18 THE COURT: All right. These exhibits, as
19 we've discussed before, will, in fact, be sealed.

20 MR. HOLDREITH: Thank you, your Honor.

21 BY MR. HOLDREITH:

22 Q. Dr. Almeroth, can you just explain -- when you
23 looked at source code, what did you have to do to be able
24 to look at it? Just physically where did you go, and how
25 did you get access to it?

1 A. The source code that was provided by Apple is
2 quite secret; and in order to look at the source code for
3 these devices, I had to go to Houston, to the offices of
4 Fish & Richardson. And in a room they had a box that
5 contained all of this source code, and it was in that
6 room that I had to look at the source code. I couldn't
7 bring in any electronic devices or anything. I just had
8 to use the one computer that was in that room.

9 Q. Is that -- in your experience as a computer
10 scientist, is that a normal kind of practice?

11 A. It's a normal practice to protect source code, but
12 the degree to which the source code in this case was
13 protected was much stronger than what I've seen in other
14 cases.

15 Q. And why is it that companies take these steps to
16 protect their source code?

17 A. If this source code got out, then somebody would
18 be able to take that source code, see exactly how these
19 devices work, and quickly and easily reproduce an almost
20 identical copy.

21 Q. And is that something they can't do just by buying
22 an iPod and looking at it?

23 A. That's correct. When you buy the iPod, it has the
24 source code on the device but it's as software and it's
25 not readable. So, even if you were able to pull that

1 software out, a person couldn't just look at that
2 software and understand what was happening.

3 This is the raw version of that source code
4 that can be read by somebody who is trained to look at
5 source code.

6 Q. And just to be clear, isn't there some way, as a
7 computer scientist, that you can just extract that source
8 code from an iPod?

9 A. Not the source code. There is a process that the
10 source code goes through where it's turned from -- I'll
11 say "human readable format," but it's really a person
12 trained in computer science -- from that format and text
13 into a representation of 1s and 0s that the processor
14 understands but that a computer scientist couldn't
15 understand. You go through that process to make it
16 easier for the device to understand what the source code
17 does, but that's not available to somebody who owns an
18 iPod or is smart enough to pull that software off.

19 THE COURT: Excuse me, counsel.

20 Ladies and gentlemen, we happen to have a
21 number of these kind of cases here in the Eastern
22 District. We're not trying to hide anything from
23 anybody, but this source code is confidential. So, I
24 order it to be protected. These measures are taken so
25 that the companies can be here, they can present it, but

1 at the same time their secrets aren't given out. There
2 is nothing wrong with that. And, so, we make every
3 effort, and you'll hear my instructions about you can
4 look at this stuff in the jury room but you can't take it
5 with you, don't be making copies of it. Because, I mean,
6 the companies are entitled -- and that's part of the
7 whole idea of intellectual property. They're entitled to
8 protect things like source code.

9 BY MR. HOLDREITH:

10 Q. Dr. Almeroth, were you able to print some portions
11 of Apple's source code for purposes of your study?

12 A. Yes, I did. There were limits on how much I could
13 print. But as part of my analysis, when I identified
14 relevant source code, for at least some of the devices, I
15 printed a binder that contained that information. Just
16 the smallest number of pages I could print that I could
17 use as part of my infringement analysis.

18 Q. And turning back to your index of things you
19 considered, Plaintiff's Exhibit 748A, is there a
20 reference to the source code that you were able to print
21 out on this list?

22 A. Yes. That's the second from the bottom. It's
23 Plaintiff's Exhibit 713. It's the classic 3 source code
24 excerpts.

25 Q. Will we be getting into that in some detail later?

1 A. Yes, sir.

2 Q. Let me just ask you to just give us an
3 introduction to what source code looks like. This is
4 Plaintiff's Exhibit 713. Is this something you printed
5 out?

6 A. Yes, it is. It's the first -- there are about 300
7 pages of printed source code. That was the minimum set I
8 could use to -- as part of my analysis. Maybe -- if you
9 want to blow up a little bit so that I can just briefly
10 explain it.

11 What you see here on the left side is a series
12 of line numbers, and then it's human readable. You can
13 see what's actually here. But the source code
14 instructions are -- unless you're familiar with the
15 syntax and how source code is written, it probably won't
16 make that much sense.

17 But you can see some of the names of the
18 things in here, for example, around line 2714, a
19 TrackField, PlayDate. You can imagine that that relates
20 to a field about a track on a date that it was played.
21 So, a person reading this code can see some of the
22 information just by looking at the words.

23 And then I understand, for example, what
24 "case" means and what "break" means. Those are
25 programming language conventions that tell me what the

1 source code is doing.

2 Q. You referred to a Line Number 2714. Can you just
3 explain what you're doing when you reference a line
4 number?

5 A. Certainly. There are a large number of files that
6 contain source code that's all combined together. It's
7 broken into different files just to keep functions
8 separate. And a function is a set of lines of code. So,
9 generally the way that -- in my analysis that I reference
10 the source code, it will be a particular file name; and
11 then in that file name a function name, and then there
12 will be line numbers that cover all of the code related
13 to that function.

14 Q. So, when you say a line number for some code we're
15 looking at, can we just look over here to the right to
16 understand what you're referring to?

17 A. Yes, sir.

18 Q. Okay. Now, Dr. Almeroth --

19 A. I'm sorry. At the top of the page, if you show
20 the top, at the very top, it will have the file name.
21 So, in this case this is the "DulcimerDatabase.c" source
22 code file for classic 3; and these are some of the lines
23 from that file.

24 Q. Now, is there one file or is there more than one
25 file of source code that makes an iPod go?

1 A. There are many files, many, many, many files.

2 Q. Approximately how many files did you look at in
3 this case?

4 A. For these 13 devices, there are about 23,000
5 files.

6 Q. And how many lines of code, more or less?

7 A. More or less, it was between 15 and 16 million
8 lines of code.

9 Q. And how long did it take you to analyze all of
10 that?

11 A. A very long time. On the clock, probably about
12 170 to 200 hours.

13 Q. That was just for looking at the source code?

14 A. Yes. And a good deal of that time was spent in
15 Houston in this office with the source code computer.

16 Q. Now, in addition to the documents that you just
17 identified with reference to the index, 748, did you also
18 look at other documents in the case?

19 A. Yes, I did.

20 Q. And did you also have access to any testimony of
21 Apple employees?

22 A. Yes, I did.

23 Q. Please explain that.

24 A. Certainly. We talked about the interrogatories.
25 In addition to interrogatories, there were Apple

1 engineers who were deposed. And a deposition is where
2 lawyers from both sides can ask in this case the Apple
3 engineers questions. It's under oath; so, it's just like
4 it was in the courtroom. It's videotaped, and the
5 transcript is taken just like at the trial here. And I
6 was either present at the depositions to see what the
7 Apple engineers said in response to questions about all
8 manner of things, from source code to the devices; and I
9 also had the written transcription that I could use later
10 to analyze and include in part of my analysis.

11 Q. How long does a deposition take like that? Is
12 that a few hours?

13 A. No. It's all day. Generally you go about seven
14 hours on the record. In some of these cases the
15 depositions spilled over into a second day.

16 Q. Now, Dr. Almeroth, did you produce a report of
17 your conclusions and the basis for the conclusions in
18 this case?

19 A. Yes, I did.

20 Q. And about how long was that report?

21 A. That report was about 25,000 pages.

22 Q. Dr. Almeroth, I want to turn to what it costs to
23 do this kind of an analysis. Now, how many total
24 hours -- you told us there were one or 200 hours to
25 analyze source code, but how many total hours did you

1 spend producing this report?

2 A. Since about September, 2009, when I started on
3 this case, I've spent about 900 hours total.

4 Q. 900 hours is a long time.

5 A. That's a lot of weekends and holidays, sir.

6 Q. Did you look for ways to do this as efficiently as
7 you could?

8 A. I did. Certainly the groupings can help; but to
9 the extent that I had all of these documents to go
10 through, I did it as quickly and as efficiently as I
11 could.

12 Q. Did you have to make more than one trip to Houston
13 to go look at source code?

14 A. Yes, sir, I did, several trips.

15 Q. Dr. Almeroth, do you charge for your time to do
16 this kind of work?

17 A. I do.

18 Q. And is there a going rate for PhDs in computer
19 science to do this kind of work?

20 A. There is.

21 Q. And do you know whether the expert that Apple
22 hired, Dr. Wicker -- did he also charge for his work?

23 A. He did.

24 Q. And do you know what his rate is?

25 A. I do. It's published in our reports. As part of

1 this document, we have to explain that we charge a
2 certain rate.

3 Q. And what are your rates in this case?

4 A. My rate in this case is \$500 an hour.

5 Q. And what is his?

6 A. It's \$550 an hour.

7 Q. All right. Dr. Almeroth, I want to now go through
8 an example of one device, one claim in some detail so
9 that we can see how you find that each element -- or how
10 you determine that each element is present in an iPod.
11 Okay?

12 A. Yes, sir.

13 Q. And can we use this claim board to help us with
14 that?

15 A. Yes.

16 Q. Just remind us of what the process is.

17 A. The process is I've taken this one claim, divided
18 it up into the limitations that are required by that
19 claim so that it's easier to go through and talk about
20 each one individually. There will be a corresponding set
21 of documents. I'll try and show some of those documents
22 that were the basis for my conclusion to go through,
23 identify the parts. And as we go through each of these
24 limitations, I'm going to ask that those boxes be checked
25 off so that we can explain that I found that limitation,

1 that I reached the conclusion that that limitation was
2 present based on the documents. And then when we get
3 done, I expect all of those limitations will be checked
4 off.

5 And it's upon that basis that all of the
6 limitations have been checked off, that I've found
7 evidence for each one of these limitations, that I would
8 opine that claim 1 is infringed by this particular
9 device.

10 Q. Dr. Almeroth, as a reminder, are we going to be
11 using this claim limitation numbering, 1, 1A, 1B?

12 A. Yes, we will.

13 Q. And is that the same numbering that's found in the
14 juror notebooks in the Patent Claims Asserted by
15 Plaintiff document?

16 A. Yes. That's correct.

17 Q. Okay. Dr. Almeroth, let's start with the first
18 part of this claim. Can you explain what the very first
19 part is?

20 A. Certainly. It says, "a player for reproducing
21 selected audio program segments comprising." It's fairly
22 short; and what it says is you have a player that can
23 play programs, or songs.

24 Q. What does that word "comprising" mean?

25 A. "Comprising" in claim terminology means

1 "including." And what that means is that this player has
2 to at least have the things that are listed here. It
3 could have other things, but those things are -- if
4 they're unrelated to these limitations don't matter for
5 infringement.

6 Q. So, is "comprising" sort of like "including"?

7 A. Yes.

8 Q. Now, Dr. Almeroth, this might seem simple for the
9 audio player part. But just to demonstrate your method,
10 when you examined the iPod classic 3, did you conclude
11 that it is an audio player for playing program segments?

12 A. Yes, I did.

13 Q. How did you do that?

14 A. Through a couple of ways. The first was to pick
15 up the device and look at it, to use it, to get it to
16 play songs. It's a player. It will play songs.

17 Based on that, I could pretty much check off
18 the box for Number 1. But I also wanted to find that it
19 was a player as described, for example, in the user guide
20 or in other Apple documents that described the iPod
21 classic 3 as a player.

22 Q. And again this might seem simple; but for
23 demonstration purposes, did you find information in
24 Apple's documents that confirmed your analysis that it's
25 an audio player?

1 A. Yes, I did.

2 Q. I'm showing you now Plaintiff's Exhibit 745. It's
3 entitled "Dulcimer, Apple's opportunity in the MP3 player
4 market." Is this one of the documents that you looked
5 at?

6 A. Yes, it is.

7 Q. What is this document?

8 A. This document is a presentation given by Tony
9 Fadell and by Stan Ng. The date on the document is
10 April 3rd, 2001. And I understand that this document was
11 a presentation given to Steve Jobs.

12 The importance about the date is this was a
13 document that was proposing the iPod, basically the
14 genesis document that said to Apple, to the CEO, "Let's
15 do a player." That's this document.

16 Q. And was there an iPod that existed? I mean, did
17 Apple have an iPod product that existed at this time?

18 A. No. This was the first document -- the first
19 presentation to Steve Jobs proposing that the iPod be
20 developed.

21 Q. All right. I'd like to turn, then, to page 9 of
22 Plaintiff's Exhibit 745. Is this one of the documents
23 that was relevant to confirm your analysis that iPods
24 are, in fact, a player?

25 A. Yes, it is.

1 Q. And how does it do that?

2 A. The title -- and in a fairly large font -- says
3 "Audio Player." And it's an audio player -- if you look
4 then in the right column, about the second bullet down,
5 "Audio Player with playlist editing and effects." That's
6 an important piece of evidence for my opinion.

7 Q. Now, just while we're on this document -- we'll
8 come back to this later. But can you explain this other
9 bullet point on the left side that says "Processor" and
10 then it has "Cirrus Logic" and "Portal Player"?

11 A. Yes. The processor is the CPU. And in this
12 initial presentation, Mr. Fadell was proposing that they
13 use a Cirrus Logic 7409 chip plus some other hardware
14 pieces, or a Portal Player 5002 chip. Part of this
15 proposal was to say, "We've done some thinking about
16 this. Here are the kinds of things that we might put
17 into this audio player."

18 Q. And just briefly, what is a Cirrus Logic 7409
19 processor chip?

20 A. Cirrus Logic is a company that makes chips. Their
21 7409 was a particular type of processor.

22 Same thing with Portal Player. That was a
23 different company, different number. Mr. Fadell was
24 considering -- or at least on this -- this slide shows
25 that there were two options in the running at this point.

1 Q. And are those CPU chips that you can go out and
2 buy on the open market?

3 A. Yes.

4 Q. As of 2001?

5 A. That's correct.

6 Q. All right. Dr. Almeroth, did you find any other
7 documents that confirmed your analysis that the iPod is
8 an audio player for playing programs?

9 A. Yes, I did.

10 Q. And I'm showing you now Plaintiff's Exhibit 108,
11 the user's guide. Is this one of the documents you
12 considered?

13 A. Yes, it is.

14 Q. And how was this useful to your analysis?

15 A. This document, like the other one -- but this one
16 for the user that comes with the device says that it's a
17 player, that it plays songs.

18 Q. I'm showing you now page 6 of Plaintiff's
19 Exhibit 108. Is this one of the pages you're speaking
20 of?

21 A. Yes, it is.

22 Q. And what on this page are you referring to?

23 A. "iPod is a music player and much more." You
24 can -- there are a couple of other bullet points. You
25 can listen to audio books. You can store thousands of

1 songs. Those are the features of an audio player that
2 can play programs.

3 Q. All right. Dr. Almeroth, this claim limitation,
4 Number 1, says "selected audio player segments." Do you
5 understand that means they must be chosen by or for a
6 user?

7 A. Yes. The word "selected" is a term that the court
8 has construed. And what that means is the court was
9 asked to go through and for some of the words in this
10 claim provide a definition. And that definition helped
11 describe the bounds of what the claim covers.

12 And what we do is we call that a "claim
13 construction," a claim term that the court has construed;
14 and there is a definition that, in doing my analysis, I
15 had to consider as part of this.

16 Q. Did you conclude that the iPod is a player that
17 allows a user to play program segments selected by or for
18 the user?

19 A. Yes. That's correct.

20 Q. Could you explain that?

21 A. Certainly. The fact that on this device you could
22 have playlists and songs -- and this is an example where
23 *iTunes* is useful because it shows evidence that the
24 things that you can play on this, the playlists and
25 songs, can come from somewhere else and that inside of

1 that thing, that's somewhere else you can create
2 playlists, you can create songs. You can populate the
3 playlist with whatever songs you want and then you can go
4 through the process of putting those playlists and songs
5 on this device. Therefore, it's a player and it
6 reproduces those songs and those songs were selected on
7 the behalf of the user.

8 Q. Dr. Almeroth, have you now pointed out everything
9 required to find that the first element, the audio
10 player, is present in the iPod?

11 A. Yes.

12 Q. So, we could check that off?

13 A. Yes, please.

14 Q. All right. That seemed pretty straightforward.
15 Are they all going to be that straightforward?

16 A. I hope so.

17 Q. We're going to have to take a little more time on
18 some of them.

19 A. There will be a little bit more detail.
20 Absolutely.

21 Q. Okay. Let's look at the second element now, which
22 is 1A, the "means for storing a plurality of program
23 segments." What is this from the user's point of view?

24 A. This is the storage capacity on this device to
25 hold the -- in this case to hold the program segments, to

1 hold the programs, to hold the songs.

2 In the first day, on Friday, I talked about
3 how one of the benefits of this device was to be able to
4 take the songs and playlists and take them with you.
5 That's a feature that's described in the patent. In
6 order to do that, this device needs some kind of storage;
7 and that's what's required by limitation 1A.

8 Q. Now, this has some unusual words. It says "means
9 for." Does that mean anything special for your analysis?

10 A. It does. When patents use "means for," it's a
11 special kind of language called "means-plus-function."
12 And I was here for the first couple of days of the trial,
13 and this means-plus-function language was described in
14 some detail as it relates to the patent.

15 Because this is in means-plus-function
16 language and because the court has offered a definition
17 of this, I used that definition in the analysis for
18 means-plus-function limitations here to reach my
19 conclusions.

20 Q. Dr. Almeroth, I'm showing you a statute from the
21 United States Code. This is Demonstrative Exhibit 1003.
22 Is this a statute that you followed when you did your
23 analysis of means-plus-function?

24 A. Yes, it is.

25 Q. And it says that you can -- it says something

1 about equivalents here.

2 A. Yes.

3 Q. Can you just explain how that affected your
4 analysis?

5 A. Certainly.

6 In the means-plus-function you have two parts.
7 There is this function here (indicating), and then there
8 is also a structure that corresponds to that function.
9 And what you have to do is --

10 MR. STEPHENS: Objection, your Honor. This is
11 opinion testimony about the law. This is not within his
12 competence or in his report.

13 THE COURT: Well, I'll let him cover the
14 basics as how this is to apply to his analysis.

15 Ladies and gentlemen, I'll instruct you on the
16 means-plus-function; and, in fact, in your jury book
17 you've already been given my definitions of what
18 "functions" are and what "structure" has been identified.
19 But I think it is appropriate for the expert to go
20 over -- or the witness to go over the framework in which
21 he conducted his analysis. But in the end, you're going
22 to follow my instructions on this.

23 Go ahead.

24 MR. STEPHENS: Thank you.

25 A. So, there is a function; and then there is a

1 corresponding structure. And what this also allows for
2 is this idea of equivalents. We saw some of that in the
3 context of the patent when it talked about, for example,
4 all of the different ways that you could communicate with
5 this device. There were some that were satellite or a
6 modem or an infrared link or you could use a telephone
7 line. It could be wireless; it could be wired.

8 Anything that's equivalent to one of the
9 structures that's identified in the patent would be
10 sufficient to meet the limitation that's here.

11 BY MR. HOLDREITH:

12 Q. Dr. Almeroth, when you did your analysis, did you
13 have some definitions from the court of what the
14 functions and what the corresponding structure is?

15 A. Yes, I did.

16 Q. And did you do the steps of first finding the
17 function and then finding whether there was the
18 corresponding structure or the equivalent in the iPod?

19 A. Yes. That's correct.

20 Q. All right. Now, for this --

21 THE COURT: Excuse me, counsel.

22 MR. HOLDREITH: Yes, sir.

23 THE COURT: Just to be sure, ladies and
24 gentlemen -- you'll be instructed on this later -- these
25 equivalent structures had to exist at that time. This is

1 going to get confusing. But when you're talking about a
2 structure that is equivalent, it can't be some new,
3 later-invented structure. It has to be a structure that
4 was available at the time the patent was issued. And,
5 so, you'll get some more instruction on that later; and
6 I'm sure the witnesses will keep this all very clear, as
7 clear as they can in their testimony. But this is one of
8 the very reasons I've told you early on do not make up
9 your mind until you hear my final instructions so you
10 know what the questions are and what the law is that you
11 have to base your answers on.

12 Go ahead.

13 BY MR. HOLDREITH:

14 Q. Dr. Almeroth, did you, when you considered
15 equivalents for the '076 patent, consider whether the
16 structure was equivalent as of the issue date of the
17 patent, 2001?

18 A. That's correct.

19 Q. To be clear, did you use the date right underneath
20 the patent number here, which is the issue date, March 6,
21 2001?

22 A. Yes, sir. That's correct.

23 Q. And is that different from the filing date when
24 the inventors filed their application?

25 A. That's correct. The inventors filed in 1996; and

1 then when the patent comes out five years later, what I
2 consider is what a person of ordinary skill in the art,
3 this person looking at the patent, would understand to
4 have been equivalent in 2001.

5 So, when it comes to, for example, "means for
6 storing a plurality of program segments," any of the
7 structures that are defined there, if this device has the
8 equivalent of that structure as of 2001, then this
9 limitation is still infringed.

10 Q. All right. Let's apply that, Dr. Almeroth. Did
11 you have a definition of the limitation 1A, means for
12 storing?

13 A. Yes, I did.

14 MR. HOLDREITH: Your Honor, may I put up a
15 board in the well?

16 THE COURT: I'm sorry?

17 MR. HOLDREITH: May I come forward to --

18 THE COURT: Yes, you may.

19 MR. HOLDREITH: Thank you.

20 BY MR. HOLDREITH:

21 Q. Dr. Almeroth, this is Demonstrative Exhibit 1033.
22 Is that the definition?

23 A. Yes, it is.

24 Q. Dr. Almeroth, could you explain, please, how the
25 definition on Demonstrative 1033 relates to the claim

1 and, in particular, claim element 15?

2 A. Certainly. The limitation for 1A is in the left
3 side of the board of Plaintiff's Demonstrative 1033.
4 That's the function and the part of the language that
5 comes from 1A.

6 And then on the right side there is a function
7 attributed to that language, and here the function is
8 "storing a plurality of program segments." You'll see
9 that the function in the right column, the right column,
10 the function --

11 JUROR: Other right.

12 MR. HOLDREITH: I'm sorry. I'm facing the
13 wrong way, folks. Excuse me.

14 A. That function mimics some of the language that's
15 in the left. In this case it's fairly straightforward to
16 understand that the function is storing a plurality of
17 program segments.

18 And then there is a corresponding piece that
19 talks then about the structure. The structure
20 corresponding to the storing function can be the
21 following structures and equivalents thereof.

22 And there are two that are identified here.
23 Only one has to be present in the device, and it's either
24 one or two or the equivalent of one or two.

25 *

1 BY MR. HOLDREITH:

2 Q. All right. Dr. Almeroth, did you find that in the
3 iPod, when you examined the classic 3, for the function
4 of "storing a plurality of program segments," it does the
5 identical function?

6 A. Yes, it does.

7 Q. And did you find structure which is either
8 identical or equivalent to the data storage system
9 consisting of a high-speed RAM and a persistent mass
10 storage device?

11 A. Yes, I did.

12 Q. Please explain.

13 A. Certainly. Using the documents, I identified that
14 the function was present and that one of 1 and 2 was
15 present. In this case it was Number 1.

16 I went through the documents to determine that
17 there was both high-speed RAM and that there was a
18 persistent mass storage device inside of this iPod
19 classic 3.

20 Q. And how did you find -- or how did you determine
21 that the iPod classic 3 has a high-speed RAM and a
22 persistent mass storage?

23 A. In this case I looked at the online technical
24 specification which we reviewed. I also looked at some
25 other documents, a bill of materials and the chip

1 schematics as well.

2 Q. Okay. I'm going to show you Plaintiff's
3 Exhibit 304, which is one of the specifications for the
4 iPod classic 3. Did this document provide any
5 information about the RAM and the persistent mass
6 storage?

7 A. Yes, it did.

8 Q. How did it do that?

9 A. The last table at the bottom talks about storage
10 and memory and it identifies a capacity of 10 gigabytes
11 and that's for the hard disk drive. That's the
12 persistent mass storage that's inside of this device.
13 So, that capacity is for storing the audio segments.

14 It also identifies RAM, which here is 32
15 megabytes. And then also related to the capacity of
16 10 gigabytes, it talks about a hard drive type, a hard
17 drive speed, and then an access speed, some of the
18 additional details about the persistent mass storage
19 that's used inside of this device.

20 Q. And how do you know that this storage is for
21 songs -- or for program segments? Excuse me.

22 A. In part of this exhibit it identifies 2500 songs.
23 That shows that the hard disk drive is used to store the
24 songs.

25 Q. Did you look at any other documents to determine

1 that the iPod classic 3 has RAM and a hard drive?

2 A. Yes, I did. For example, the bill of materials I
3 also looked at as well.

4 Q. Okay. I'm now showing you Plaintiff's
5 Exhibit 325. Is this the bill of materials for the
6 classic 3?

7 A. Yes, it is.

8 Q. And what in here gave you information?

9 A. There is a page in this document that lists the
10 RAM, the random access memory, the high-speed RAM that's
11 used inside of a classic 3.

12 Q. I'm showing you page 19 of Plaintiff's
13 Exhibit 325, and I'm sure it's very difficult to read.
14 So, I'm going to blow it up.

15 Is this the page that you were referring to?

16 A. Yes, it is.

17 Q. And how does this tell you about RAM or persistent
18 storage?

19 A. It's a little hard to read, but you can see here
20 (indicating) it talks about Samsung semiconductor. They
21 are a company that makes RAM.

22 And then you can look over here in this column
23 (indicating). It talks about SDRAM. There are some
24 additional details about that RAM that are provided.

25 So, that tells me, based on the bill of

1 materials, that I know one of the components inside of
2 this device is the high-speed RAM that's identified.

3 THE COURT: All right. Counsel, we're going
4 to take a break.

5 Ladies and gentlemen, I'll ask you to be back
6 at quarter past.

7 (The jury exits the courtroom, 2:00 p.m.)

8 THE COURT: Counsel, to deal with the
9 ever-present problem in one of these cases of
10 instructing -- you can step down, sir -- of instructing
11 the jury on the structural equivalents and the doctrine
12 of equivalents -- which is obviously so easy for judges
13 and lawyers to understand, but perhaps not for jurors --
14 and looking at the *Al-Site Corporation versus VSI*
15 *International, Inc.*, case, 174 F.3d 1308, which is Fed
16 Circuit 1999, I am considering telling them that
17 structural equivalents refers to an available substitute
18 or then-available substitute, so that they don't get it
19 confused when fairly soon in that set of instructions
20 we're talking about the doctrine of equivalents.

21 It seems that that case does a pretty good job
22 of focusing on the available substitute. Obviously your
23 experts may have to use both words.

24 Let me first hear from Apple. What are your
25 thoughts on that?

1 MR. STEPHENS: Well, your Honor, I think I
2 want to take a look at the case to be sure; but it seems
3 like it might be slightly overly broad because the
4 difference, as you know, has to be insubstantial, your
5 Honor, and a substitute that costs a whole lot more money
6 is not insubstantially different, for example.

7 THE COURT: Well, now, are you talking about
8 the doctrine of equivalents or available structures --
9 the equivalent structures?

10 MR. STEPHENS: In terms of whether it is an
11 equivalent structure, I don't think it matters. The real
12 difference is whether the function is met between those
13 two, as you know.

14 THE COURT: Well, see, already we're confused.

15 We have and we will be giving to the jury a --
16 and there will be a lot of discussion among the experts
17 on equivalent structures. But there is also this
18 doctrine of equivalents. They aren't even spelled
19 differently. It isn't equivalence with a C on one and
20 equivalents with a T. No, no. We had to give the jury
21 this exact same word twice and I'm trying to think of a
22 way to explain it and reading this case -- and I really
23 was hoping we wouldn't get into this before we had this
24 discussion -- is figure out a way to focus them on the
25 then-available substitutes for structural equivalents so

1 that they're not picking out something that somebody came
2 up with years and years later for structure. And then
3 the doctrine of equivalents, of course, has its own
4 limitation -- "limitations" is a bad word, isn't it --
5 has its own requirements.

6 And that's what I'm trying to -- I'm bringing
7 that up so that if your experts -- I'm trying to come up
8 with some language and tell you in advance so maybe the
9 experts use the same language. If we can't agree, then
10 I'll just have to make up my decision; but I'm just
11 letting both sides know -- and there are other opinions
12 that came out around the same time and earlier that talk
13 about that. But you might take a look at that because --

14 MR. STEPHENS: Absolutely, your Honor.

15 THE COURT: It does seem to be -- it would be
16 helpful if we could come up with a way of getting on the
17 same sheet of music in terms of letting the jury know
18 what the difference is, especially given some of the
19 defenses that, based on the papers, I think you're going
20 to try to come up with. It's going to start getting real
21 confusing.

22 I think I heard in your opening you were
23 talking about this Clickwheel that you patented later on
24 and invented later on. Well, is it really fair that
25 that's kind of an equivalent when it's really not a

1 structural equivalent if it wasn't then available? But
2 if you insist on always using the equivalent term, it's a
3 little bit hard for you to explain later on that, gee,
4 these poor dumb jurors didn't understand, when we can't
5 come up with a way to explain it to them.

6 MR. STEPHENS: I certainly agree some sort of
7 instruction is appropriate, your Honor.

8 THE COURT: Okay. Then let's take a look at
9 that one because I may actually tell them that earlier so
10 they can understand and it would also make it easier for
11 the experts if they can both be talking about, "Well,
12 that wasn't available then" -- that would be your point
13 if that's what your point is. And their point would be,
14 "Oh, yes, it was available then because." And at least
15 they would be fighting on the same thing rather than
16 blindfolded and trying to guess what was coming up later.
17 So, I need counsel to look at that over the break. My
18 guess is it would be helpful to come to a resolution
19 on that or at least an idea on that pretty quick.

20 I came up with -- there are some other words
21 that could be used. I mean, "available substitute" seems
22 to be one that is used by the judges in that case action;
23 and it seems to be one of the clearer -- that case is one
24 of the clearer discussions of that dichotomy, which
25 causes a lot of problems to very learned judges and

1 lawyers, from what I can see.

2 All right. We're going to be in recess then
3 until quarter past.

4 (Recess, 2:06 p.m. to 2:16 p.m.)

5 (Open court, all parties present, jury
6 present.)

7 THE COURT: Go ahead, counsel.

8 MR. HOLDREITH: Thank you, your Honor.

9 BY MR. HOLDREITH:

10 Q. Dr. Almeroth, have you now explained where you
11 found in the bill of materials for the classic 3 that
12 there is a RAM?

13 A. Yes, sir.

14 Q. Is that a high-speed RAM?

15 A. Yes, it is.

16 Q. Did you also find evidence that there is
17 persistent storage?

18 A. Yes, I did.

19 Q. Where did you find that?

20 A. That was also in the bill of materials on a later
21 page.

22 Q. Again, I know this page is very small type; so,
23 I'm going to blow it up. Well, you can't see that, can
24 you? Let's try again.

25 Did I get the right part there?

1 A. Yes, you did.

2 Q. Okay. Now, how is this relevant to your opinion?

3 A. This is relevant to my opinion because it
4 describes as part of the bill of materials that this is a
5 Toshiba and then it talks about that it's a hard drive
6 here (indicating). Some of those numbers are hard to
7 see. But I've looked at -- more closely at a version of
8 this, and it's "HDD" for hard disk drive. It mentions
9 some of the other characteristics that were in the online
10 technical specification, and it mentions "Q14" here as
11 well.

12 Q. And if you look just over to the next column over,
13 on page 25 of Plaintiff's Exhibit 325, is that a little
14 more readable over there?

15 A. Yes. These are additional details about this
16 particular device. It mentions "Toshiba" again. In this
17 case the 1.8-inch is the size of the hard drive; so,
18 that's maybe the size to your first knuckle. And it's a
19 hard disk drive. And it also includes a size there for
20 15 gigabytes.

21 Q. All right. Dr. Almeroth, after considering the
22 iPod itself and the documents that you looked at,
23 including the ones you've explained, did you conclude
24 that everything required by claim element 1A of the
25 '076 patent is found in the iPod classic 3?

1 A. Yes, it is.

2 Q. Should I check that off?

3 A. Yes, please.

4 Q. All right. Dr. Almeroth, let's go to claim
5 limitation 1B of the '076 patent. That recites something
6 about a "means for receiving and storing a file of data
7 establishing a sequence." What is that from the user's
8 point of view?

9 A. That is the means for receiving and storing the
10 playlists that come across. And it's in that playlist as
11 part of the sequence that it describes; it's the order in
12 which they're scheduled to be reproduced.

13 This is specifically the means for receiving
14 and storing; so, there are two different functions there,
15 first of all receiving the playlist and then also storing
16 the playlist.

17 Q. Is there a definition of this term that identifies
18 the function and the structure?

19 A. Yes, there is.

20 Q. Dr. Almeroth, I'm now showing Demonstrative
21 Number 1027. Is that the definition that's relevant to
22 limitation 1B?

23 A. Yes, it is.

24 Q. Could you please explain a little bit more about
25 what the function and the structure are here?

1 A. Certainly. There's two functions and two separate
2 structures, and they are broken apart. The top function
3 is -- the function is "receiving and storing," and then
4 there are two separate structures. There is a structure
5 defined for receiving; and then towards the bottom, after
6 the numbered list 1 through 6, there is a structure for
7 storing as well. So, I have to identify that the
8 structure is there and that one from the list of six and
9 one from the list of two are present in the device.

10 Q. Before we get to the structure, let's just focus
11 on the function. Did you find for the iPod classic 3
12 that it performs the identical function of receiving and
13 storing a file of data establishing a sequence?

14 A. Yes, I did.

15 Q. Now, let me pause for a moment. Why is it
16 important to the user to have a separate file of data
17 establishing a sequence of playback?

18 A. The importance here is if you've got a library of
19 lots of songs and they're all stored on the hard drive,
20 the more songs that you have, you need some ability to
21 try and organize those. And if the songs all sort of
22 exist as separate files, you'd like some way to organize
23 them, to be able to build a playlist. And you'd like to
24 be able to build a playlist without changing the songs
25 themselves. You can create Playlist Number 1, and it has

1 a set of songs on it. A Playlist Number 2, you know, may
2 be for party music or working-out music or drinking wine
3 and listening to jazz music. You could have separate
4 playlists, and those index all of the different songs.
5 And by creating separate playlists, you can not have to
6 change the audio content.

7 Q. What do you mean by "not have to change the audio
8 content"?

9 A. The songs stay the same, and the playlist is
10 really just an index into all of those different songs
11 that will pull out a set in an ordered sequence.

12 Q. Does that mean you can change what you listen to
13 and in what order you listen to without re-recording the
14 songs onto your player?

15 A. That's correct, either by creating a new list or
16 changing the playlist that you have.

17 Q. Now, is the iPod programmed specifically to
18 receive and store a file of data establishing a sequence?

19 A. Yes, it is.

20 Q. And how did you determine that?

21 A. Well, I determined that again by using the device
22 and looking at what it did but then also diving deeper
23 into the user guide and the bill of materials, looking at
24 the same kind of structures for what's defined here and
25 required on the page and what exists in the iPod.

1 Q. Did you find source code in the iPod that told you
2 that it's specifically programmed to receive and store
3 playlists?

4 A. Yes, that's correct. The source code told me the
5 structure of the data, of the playlists as they were
6 stored on the disk. And then that would be separate from
7 the songs themselves; so, that's an important
8 requirement.

9 Q. Now, let me pause to ask you an important point.
10 Does the iPod have to actually have a playlist stored on
11 it to be infringing this claim?

12 A. No.

13 Q. Why is that?

14 A. What's important in this claim is to be
15 specifically programmed to have the capability to store
16 these playlists. It doesn't have to actually have
17 playlists on the device to infringe; but it has to
18 perform these functions, to be capable of performing
19 these functions based on the software that's in there and
20 also using the hardware components that were built into
21 the device. Those have to be for storing the songs in
22 the playlists that can be transferred onto the device.

23 Q. So, are you looking to see whether the iPod is
24 able to store playlists rather than looking to see if
25 there is actually a playlist on there?

1 A. That's correct.

2 Q. All right. Now, Dr. Almeroth, did you, in fact,
3 find a means for receiving that is identical or
4 equivalent to one of the structures listed for the means
5 for receiving?

6 A. Yes, I did.

7 Q. Can you explain that, please?

8 A. Certainly. The structures that are identified
9 here are the six that are on the list. And the exercise
10 that I had to go through was to find one of the six or
11 its equivalent.

12 Q. Did you focus on one of those six in particular?

13 A. Yes, I did. Number 4, the "radio or infrared link
14 for connecting to a local communications server computer
15 linked to the Internet."

16 Q. Can you explain what that means?

17 A. What that means is what we're looking for is the
18 structure on this device -- this claim is about this
19 player, and it's the structure that's on this device that
20 can be used for receiving. And then the characteristic
21 that's required by the structure or an equivalent to this
22 structure is a "radio or infrared link for connecting to
23 a local communications server computer linked to the
24 Internet." The key here is this has to be the thing on
25 the device for the receiving. That's the thing that's

1 required. But it has to be capable of being able to
2 receive from a local communications server computer
3 that's connected to the Internet.

4 Q. Now, focusing on the iPod, can you explain what
5 the structure is that's for connecting?

6 A. Certainly. That's the local communication --
7 sorry -- that's the customized communication port that's
8 on the bottom of the device.

9 Q. And if someone is looking on the bottom of an
10 iPod, can you just describe in a little more detail?
11 Physically what are you looking at there?

12 A. Right. It's a 30-pin connector and you can plug
13 in a cable to it and it will be, for example, running the
14 USB protocol or FireWire.

15 Q. What's the USB protocol?

16 A. Those are two examples of protocols that you can
17 run over this physical connection, that you can then use
18 to exchange data.

19 Q. And you mentioned "FireWire." What's that?

20 A. FireWire is another example. It's a type of cable
21 and connection that was used in the classic 1 and 2, for
22 example.

23 Q. And did the classic 3 use USB?

24 A. Yes. It's capable of supporting USB, and it does
25 use USB.

1 Q. So, did the iPod start using FireWire?

2 A. It did. The original design was to use the
3 FireWire protocol.

4 Q. And then -- we've heard a lot about FireWire in
5 Apple's patents, that they say they have them FireWired.
6 What happened with FireWire?

7 A. Well, they stopped using FireWire for data
8 transfer; and they switched over to using the USB
9 protocol for data transfer.

10 Q. Do later iPods use FireWire for data transfer?

11 A. They do not.

12 Q. Now, which models of the iPod can use FireWire for
13 data transfer?

14 A. The classic 1 and the classic 2 certainly. I
15 believe also the classic 3. And I think that that's it,
16 just those three for data transfer.

17 Q. After that?

18 A. They switched to USB.

19 Q. Okay. Now, let me just quickly show you a
20 timeline. It's Demonstrative Exhibit 1004.

21 Can you explain what this chart is and just
22 explain what you just told us with reference to the
23 chart?

24 A. Certainly. The date is at the top and at the
25 bottom here. There's three important dates related to

1 the patents here. You have the patent application date
2 in October, '96. And then you have the '076 patent issue
3 date in 2001, and then the '178 patent is issued in 2009.

4 The rest of this chart, the middle, is divided
5 up into three regions for each family. The G.1 through 6
6 relate to the iPod classic, and that's starting out in
7 almost white and going to darker green.

8 And then you have the mini for Versions 1 and
9 2 and then the nano for Generations 1 through 5.

10 And what you see here are when these devices
11 first became available. And then when the next device
12 became available, Apple will stop selling from the
13 generation previous.

14 So, in the case of Generation 1 and 2, a
15 generation came out first. That was in 2001.
16 Generation 2 briefly came out at the same time, but they
17 both stopped being for sale in 2003 when Generation 3
18 came out. And then before Generation 3 was taken off the
19 market to be replaced by 4, the classic 1 [sic] came out.
20 And you can see just based on the time how these
21 different devices line up.

22 Q. So, the FireWire for data transfer, which ones is
23 that?

24 A. That's back here (indicating), in 2001, 2002, and
25 part of 2003.

1 Q. And the remainder?

2 A. That's all using the USB protocol.

3 Q. And not a FireWire for data transfer anymore?

4 A. That's correct.

5 Q. Dr. Almeroth, did you find anything in Apple's
6 documents about whether the port or the connector on the
7 iPod is for connecting to a local communications server?

8 A. Yes, I did.

9 Q. What did you find?

10 A. For example, in the user guide there is a picture
11 and some text describing how this port is then connected
12 to something else.

13 Q. I'm showing you Plaintiff's Exhibit 108, the
14 cover. And now if we go to page 12 of Plaintiff's
15 Exhibit 108, is this the figure you were describing?

16 A. Yes, sir.

17 Q. And can you explain your opinion with reference to
18 this figure?

19 A. Certainly. This talks about the iPod having the
20 capability to connect to and transfer music. And it does
21 that through -- here it talks about FireWire capable, or
22 it can use USB as well.

23 And then the sentence at the bottom of the
24 page says, "When you connect iPod to your computer" --

25 MR. STEPHENS: Objection, your Honor. I think

1 he's about to talk about a nonaccused product.

2 THE COURT: Overruled.

3 A. It says, "When you connect iPod to your computer,
4 *iTunes* opens automatically and transfers the songs and
5 playlists in your music library to iPod."

6 Now, again, the importance here is this means
7 for receiving at the bottom, the communication port
8 that's shown on this figure that's connected then to that
9 wire. And it has to have the capability to connect to a
10 local communications server computer that's then
11 connected to the Internet.

12 As evidence that this communications port has
13 that capability is this figure. And this figure shows
14 that when you connect it to *iTunes*, that's evidence that
15 *iTunes* will then transfer over, for example with this
16 limitation, playlists. And this is evidence then that
17 this device and its communication port has the capability
18 to receive the playlists.

19 Q. Okay. And you're relating that to, on the
20 Demonstrative Exhibit 1027, Structure Number 4 for
21 receiving; is that right?

22 A. Yes, sir. And I mentioned the words "the local
23 communications server computer linked to the Internet."
24 That's part of Number 4. And it's all with respect to
25 the function then at the top, "receiving and storing a

1 file of data establishing a sequence."

2 Q. Now, can you just explain what an infrared port
3 is, Dr. Almeroth?

4 A. An infrared port -- it's a port similar to this,
5 and it's used for transferring data as well. There are a
6 lot of similarities between the infrared port and the
7 port that the Apple iPod uses.

8 Q. All right. Dr. Almeroth, is an infrared link
9 something that uses a wire like is shown in this figure
10 from the iPod user guide?

11 A. No. An infrared link is wireless. And then the
12 iPod uses a wired link.

13 Q. Now, why is it that you say a wired link is an
14 equivalent to a wireless link?

15 A. The important question here is whether it's
16 equivalent. And the way of determining equivalents is
17 whether there are insubstantial differences with respect
18 to using the wireless versus the wired link as it relates
19 to receiving the data establishing a -- sorry -- the file
20 of data establishing a sequence.

21 It doesn't matter to that function whether the
22 data comes across as wireless or whether or not it comes
23 across as wired. It's an insubstantial difference with
24 respect to performing that exact function.

25 Q. So, I want to ask you now, Dr. Almeroth, from the

1 perspective of someone skilled in the art, in 2001, are
2 USB and FireWire and an infrared link equivalent links
3 for connecting to a local computer and receiving a
4 sequencing file?

5 A. Yes. I was a person of skill in the art. I
6 thought about what I knew at that time, and it's my
7 opinion that they were equivalent.

8 Q. Now, did you do anything to determine whether
9 other people in 2001 had the same view?

10 A. Yes, I did. I wanted just more than my opinion.
11 I wanted some evidence that I could point to that other
12 people, people of ordinary skill in the art at the time
13 in 2001, would think that these two things were
14 equivalent, that there would be insubstantial
15 differences.

16 Q. And did you find anything?

17 A. Yes, sir, I did.

18 Q. What did you find?

19 A. I found a number of documents that describe both
20 USB and infrared links being used interchangeably for the
21 transfer of a file of data establishing a sequence.

22 Q. Can you give us an example?

23 A. Sure. In one example I looked at documents that
24 Apple had. I figured the Apple engineers would be people
25 of ordinary skill in the art and documents that they had

1 available to them would be good evidence that they and
2 other people who wrote those documents thought that there
3 would be an equivalent between infrared and USB.

4 Q. And what did you find?

5 A. I found that there was support for that kind of
6 opinion.

7 Q. I'd like to show you now Plaintiff's Exhibit 759.
8 Is this one of the documents you found?

9 A. Yes, it is.

10 Q. Is this an Apple company document that was printed
11 by Apple?

12 A. No. This is from the company Cirrus Logic. It's
13 at the top. But this was a document that was available
14 to Apple. In fact, I received this document from Apple
15 as part of the documents that it produced.

16 What's also important about this document is
17 the Cirrus Logic chip was one of the things that
18 Mr. Fadell considered that could go into the original
19 iPod.

20 Q. Let's just go back to that Plaintiff's
21 Exhibit 745. Is this the document where you were
22 explaining earlier that Mr. Fadell was considering the
23 Cirrus chip?

24 A. Yes, it is.

25 Q. And if we look at page 9, is this the page you're

1 referring to?

2 A. Yes, it is.

3 Q. Can you point that out for us?

4 A. That's under the "Processor," the Cirrus Logic
5 7409 (indicating).

6 Q. Returning now to Plaintiff's Exhibit 759, the
7 Cirrus Logic chip. We see this one is 7209 rather than
8 7409. What's the explanation for that?

9 A. It's a slightly different chip, a different model
10 number. But this was a document that Cirrus Logic had
11 given to Apple and that Apple had produced as something
12 that they knew about. So, the chips between the 7209 and
13 the 7409 were very similar.

14 That doesn't matter because the point is
15 really to demonstrate that Apple engineers plus the
16 people at Cirrus Logic thought that the use of an
17 infrared link was substantially the same as the use of a
18 wired USB connection.

19 Q. Dr. Almeroth, can you just orient us here a little
20 bit? The title here says this is an "Ultra-Low-Power
21 Audio Decoder System-on-Chip." What is the thing that
22 this document is talking about?

23 A. This is talking about a CPU, the brains of a
24 device -- for example, like the iPod, that could play
25 songs, organize -- sorry -- mainly play songs and

1 implement the functions of playing songs.

2 Q. And is this a processor you could buy off the
3 shelf in 2001?

4 A. That's right. This is a document from Cirrus
5 Logic that they wrote describing, in a significant amount
6 of detail -- I think this is about a 150-page document --
7 that describes in detail all of the components and what
8 this Cirrus Logic chip does. So, they were trying to
9 sell this chip that people could use in portable players.

10 Q. And turning now to page 3 of Plaintiff's
11 Exhibit 759, does this tell you what this Cirrus Logic
12 processor was designed for?

13 A. Yes, it does. If you can blow that up, it says,
14 (reading) as shown in the system block diagram, simply
15 adding flash memory, an LCD -- which is a kind of
16 display -- an audio digital audio converter, and some
17 discrete components, a complete low power digital audio
18 player system can be made.

19 And it refers to an illustration on the next
20 page.

21 Q. What does that mean?

22 A. It means that with this chip you could get some
23 additional components -- like flash memory, a display,
24 and a digital converter -- and you could build an audio
25 player.

1 Q. And are the components listed here under "System
2 Design" in Exhibit 759 components that were readily
3 available in 2001?

4 A. Yes, they were. I don't think we had talked about
5 the date of this document, but this chip and the
6 components that it's talking about was even available
7 earlier. The date on this document on the front page is
8 December, 1999.

9 Q. Now, we're talking about 2001, around the time the
10 patent issued right now, right?

11 A. Yes.

12 Q. Was this kind of chip available in 1996 when the
13 patent was filed?

14 A. No, it was not.

15 Q. Okay. And we're talking about 2001 because this
16 is an assessment of equivalents around the time the
17 patent issued?

18 A. Yes, that's correct. It's all about the question
19 of evaluating whether Number 4 that's been identified by
20 the court is equivalent to what the iPod has.

21 Q. Dr. Almeroth, I'd like to ask you now: What is it
22 here that is relevant to whether an infrared link and a
23 USB link are equivalent for receiving data?

24 A. Certainly. It's with respect to the function.
25 And the function here is "receiving and storing a file of

1 data establishing a sequence." It's for transferring
2 data. That is the key.

3 And if you look at this document, in the first
4 column at the bottom, it says "Data Download." And there
5 what this chip is talking about is the ability to do data
6 download. So, if you continue on and read through that
7 column -- in fact, the most relevant paragraphs of that
8 column are the last two before the "Digital Audio
9 Interface."

10 Q. These two (indicating)?

11 A. Yes, sir.

12 Q. And what these say is?

13 A. (Reading) this chip can be connected through an
14 industry standard USB slave device through an external
15 interface.

16 The next sentence, that it has power. It has
17 a data bus.

18 And then it says that (reading) the EP7209,
19 through its USB interface, can support a rapid transfer
20 of compressed audio data over a USB interface.

21 Okay. That's Point Number 1.

22 Point Number 2 is the next paragraph.

23 (Reading) The EP7209 also includes a built-in 115.2
24 kilobyte-per-second IrDA SIR protocol encoder/decoder --

25 Q. Let me stop you right there. What is that?

1 A. IrDA is the infrared data association. They
2 developed the standard for sending data over an infrared
3 link. Okay?

4 The SIR is the serial interface.

5 And the protocol encoder/decoder is the
6 ability to change the bits and the light signals and then
7 to receive bits that are light signals and then divert
8 them back into the sequencing file. Okay?

9 Q. Is this an IR link?

10 A. Yes. Sorry. It's an IR link.

11 These two paragraphs show that on this chip,
12 this Cirrus Logic 7209, it had both a USB and an infrared
13 link for exchanging data. That is very good evidence
14 that these two are considered to be equivalent, that they
15 could be used to do the same thing.

16 Q. And how do you know the IR link on this Cirrus
17 Logic chip could be used for downloading data?

18 A. The part you haven't highlighted yet, "to drive an
19 infrared communication interface to download the data."

20 Q. Dr. Almeroth, did you find any other documents
21 from Apple's files that are relevant to whether an IR
22 link is equivalent to an USB link?

23 A. Yes, I did.

24 Q. I'm showing you now Plaintiff's Exhibit 760. Is
25 that one of those documents?

1 A. Yes, it is.

2 Q. And what is this?

3 A. This is a presentation that's given by Portal
4 Player. So, that's another manufacturer of chips. This
5 is -- the date on this is 2001. This was a presentation
6 given to Mr. Fadell describing the capabilities of the
7 Portal Player chip.

8 Again, the idea is in the other -- maybe you
9 could also show Exhibit 745 on page 9 again.

10 Q. Okay. I'm now showing you the cover of
11 Plaintiff's Exhibit 745.

12 A. This was the presentation that Mr. Fadell had
13 given to Mr. Jobs. And on page 9 these are the two
14 processors -- the first one was the Cirrus Logic, and
15 then the next one was Portal Player. Mr. Fadell had
16 considered the two of those as alternatives and
17 possibilities to put into the original iPod.

18 So, if you could go back to Exhibit 760. Part
19 of that is using the information that's contained in this
20 Portal Player presentation that we'll go through and
21 describe the capabilities of this chip as an alternative.

22 Q. I'm now showing you page 7 of Plaintiff's
23 Exhibit 760. Is this part of this presentation to
24 Mr. Fadell by Portal Player?

25 A. Yes, it is.

1 Q. What do you see here?

2 A. The title is "Networked Audio Vision." There is a
3 personal computer here (indicating). There is a home
4 entertainment system, wireless speakers, a faceplate from
5 a car, memory. There's a PalmPilot here (indicating).
6 There's a whole variety of devices. And what this is
7 about is synchronizing content on PCs, cell phones, and
8 PDAs at home and at work.

9 And it describes two kinds of networks. There
10 is a network here (indicating) where the solid line is a
11 hardwired connection. It's an actual wire.

12 And then the dashed lines are for wireless.
13 So, there's wireless over here (indicating) that can go
14 to the home audio, to the car faceplate or the speakers;
15 and there's also wireless over here (indicating) that can
16 be used to sync or transfer a stream of data.

17 And what this figure is describing is in some
18 instances you can use a hardwired connection or you can
19 use a wireless connection to synchronize content.

20 Q. Does synchronizing content include -- in an audio
21 environment, does that include moving songs around?

22 A. Moving songs and moving playlists, yes.

23 Q. And does this figure show using a USB connection
24 to move that data?

25 A. Yes, it does. One of the wired connections here

1 is USB.

2 Q. And what does this figure show that's relevant to
3 whether an IR connection is equivalent to a USB
4 connection?

5 A. In the PalmPilot that existed in 2001, the ability
6 to transfer data was done using infrared.

7 Q. And what do you conclude from this drawing, then?

8 A. This is another piece of evidence that
9 demonstrates that people of skill in the art, including
10 the engineers at Apple, understood that using USB to
11 transfer data and songs was equivalent to using IrDA to
12 transfer songs. The only real difference between these
13 with respect to the wireless versus the wired was an
14 insubstantial difference as it relates to the function of
15 receiving and storing a file of data establishing a
16 sequence.

17 Q. All right. Dr. Almeroth, now I want to ask you
18 one more thing about this structure. It says something
19 about a local communications server connected to the
20 Internet. What's the significance of that to your
21 conclusion?

22 A. Right. The structure here -- and the structure
23 we're talking about is this communications port on the
24 device -- has to have the capability to communicate to a
25 local communications server that's connected to the

1 Internet.

2 Again, the focus here is on what this
3 device -- what this -- the capability this communications
4 port has. So, one of the things that I can look at for
5 support is back in the user guide where it describes how
6 one of the things that you connect to this is an *iTunes*
7 computer and then that *iTunes* --

8 MR. STEPHENS: Objection, your Honor. This is
9 not an accused product.

10 THE COURT: Has anyone said this was an
11 accused product?

12 MR. STEPHENS: No. They've admitted it's not.

13 THE COURT: Okay. And, so, your objection is?

14 MR. STEPHENS: My objection is he's using a
15 product that's not accused to demonstrate infringement to
16 satisfy an element of the claim, and that is this port
17 for connecting to a communications server for connection
18 to the Internet.

19 THE COURT: Okay. Again, counsel, I don't
20 think anyone has accused the *iTunes* or the computer; and
21 on the other hand, the accused devices do have to be able
22 to accept communications from them. If you're
23 complaining that he's showing where it's coming from, I
24 don't see where that's an objection; so, overruled.

25 *

1 BY MR. HOLDREITH:

2 Q. Please continue, Dr. Almeroth.

3 A. Certainly. And I want to make it clear that we're
4 talking about the player and this communications port.

5 But as evidence that this communications port
6 has that capability, you can look at this figure and see
7 that it's capable of connecting to an *iTunes* computer and
8 then that *iTunes* computer can then be connected to the
9 Internet.

10 The *iTunes* computer and its connection to the
11 Internet and the fact that you can do that is evidence
12 that this device has that capability.

13 Q. And can the port in the iPod be used, in fact, for
14 connecting to a local communications server connected to
15 the Internet?

16 A. Yes, it can.

17 Q. And is the iPod programmed specifically to be able
18 to connect to a computer that's acting as a local
19 communications server?

20 A. Yes. The software in this device when it's
21 connected to an *iTunes* computer is specifically
22 programmed to connect to the *iTunes* computer which then
23 might be connected to the Internet.

24 THE COURT: Okay. Just for record purposes,
25 you keep talking about an *iTunes* computer. Do you mean a

1 computer with *iTunes* loaded on it?

2 THE WITNESS: Yes, sir.

3 THE COURT: So, it could be a Toshiba computer
4 or --

5 THE WITNESS: It could be a laptop or a
6 desktop. This figure shows a laptop; but yes, any
7 computer --

8 THE COURT: Or perhaps any Apple computer?

9 THE WITNESS: Yes.

10 THE COURT: All right.

11 BY MR. HOLDREITH:

12 Q. All right. Dr. Almeroth, have you now explained
13 how it is that the iPod classic 3 that you examined meets
14 limitation 1B of claim 1 of the '076 patent?

15 A. Yes, I have.

16 Q. And upon examining the iPod and the documents you
17 examined and the source code and the testimony of
18 witnesses, did you conclude that everything required for
19 the receiving structure in claim 1 is found in the iPod
20 classic 3?

21 A. Yes, I did.

22 Q. Now, have we done the storing structure yet?

23 A. We haven't done the storing structure as it
24 relates to the playlist, the data establishing a
25 sequence.

1 Q. Okay. And did you find that there is storing
2 structure as it relates to the playlist in the iPod
3 classic 3?

4 A. Yes, I did.

5 Q. And how does that relate to this definition?

6 A. That relates to this definition because you need
7 the ability to store the playlists as well and you have
8 to have -- with respect to performing the function using
9 one of the two structures that are on the page. So, at
10 the bottom you have 1 and 2; and the one that's in black,
11 the data storage system consisting of both high-speed RAM
12 and the persistent mass storage device, those were the
13 things that I found in the iPod for storing a file of
14 data establishing a sequence.

15 Q. Now, you explained the structure for storing the
16 songs before, right? That was the RAM and the hard
17 drive?

18 A. Yes.

19 Q. How does that relate to this structure?

20 A. It's the same structure. But in addition to
21 storing the program segments, it's able to separately
22 store the playlists as well.

23 Q. And is there anything we need to go over about the
24 RAM or the hard drive again, or is that the same
25 structure as we just went through?

1 A. It's the same structures. The two pages in the
2 bill of materials, the online technical specification
3 shows that you have those structures.

4 Q. And the bill of materials is Plaintiff's
5 Exhibit 325?

6 A. That's correct.

7 Q. And the specification is Plaintiff's Exhibit 304?

8 A. Yes.

9 Q. All right. Dr. Almeroth, have we now found
10 everything required by element 1B of claim 1 of the
11 '076 patent in the iPod classic 3?

12 A. Yes, we have.

13 Q. Should we check that off?

14 A. Yes, please.

15 Q. All right, Dr. Almeroth, let's turn to element 1C,
16 a "means for receiving control commands from a user of
17 said player." What is this from a user's point of view?

18 A. This is the part of the iPod that allows you to
19 input user commands, to press the buttons, whatever you
20 need on the device to think about, "Okay. I want to skip
21 forward or go back or select a song or play a song."
22 That's the interface for accepting commands.

23 Q. And is there a claim definition that tells you
24 what the function and the structure are for this?

25 A. Yes, there is.

1 Q. I'm putting up on the screen now Demonstrative
2 Exhibit 1035. Is that the definition for element 1C?

3 A. Yes.

4 Q. Could you please explain it?

5 A. Certainly. This is also means-plus-function.
6 There's a function, and that's -- it mimics the claim
7 language.

8 And then there is also a structure. And it
9 says, "The structure corresponding to the 'accepting'
10 function can be the following structures and
11 equivalents."

12 So, just like before, there is now a list of
13 Items 1 through 4; and you have to find one of those -- I
14 have to find one of those that is the same or equivalent
15 to what's on the iPod.

16 Q. Focusing now just on the function, Dr. Almeroth,
17 did you find in the iPod classic 3 that there is
18 structure that performs this identical function of
19 accepting control commands from a user?

20 A. I did.

21 Q. And where did you find that?

22 A. That is the buttons on the device itself. And
23 that's also supported by what's, for example, in the user
24 guide that describes the buttons you have to press to
25 make it operate. That's what I found.

1 Q. Now, turning to the structure, what is the
2 structure that is described in the claim, according to
3 this definition, for that function?

4 A. The structure that I've identified is "a
5 keyboard."

6 Q. Now, does an iPod -- I mean, it doesn't have a
7 keyboard like on this computer here where you could write
8 a letter, right?

9 A. No, not that kind of keyboard.

10 Q. Why do you say there is a keyboard on the iPod or
11 the equivalent?

12 A. Well, the keyboard is a broader term than just the
13 kind of keyboard you have on a desktop computer or that
14 you have on a laptop. I mean, the word literally comes
15 from a board of keys. And, so, the structure that the
16 iPod has is exactly that, a set of keys that you have on
17 the device itself.

18 Q. So, in your opinion, in 2001 to somebody skilled
19 in this art, are the four buttons on the iPod a structure
20 which is identical or equivalent to a keyboard as defined
21 here?

22 A. Yes.

23 Q. And did you do anything to confirm that view?

24 A. Yes, I did. One of the sources of information --
25 again, I believed it to be so; but then I went to find

1 additional information that would corroborate my opinion,
2 something that existed in the literature that would allow
3 me to reach this conclusion.

4 Q. What did you find?

5 A. I used an IEEE dictionary -- it's a technical
6 dictionary used by people of skill in the art -- to look
7 up, for example, what a choice device was, a way of
8 entering in choices.

9 Q. I'm showing you now Plaintiff's Exhibit 767. This
10 is the cover. I realize it's very hard to read. Can you
11 just tell us what this is?

12 A. Sure. It says, "The IEEE Standard Dictionary of
13 Electrical and Electronics Terms, Sixth Edition."

14 Q. And is that a standard reference in your field?

15 A. Yes, sir, it is.

16 Q. And the Sixth Edition relates to what time period?

17 I'll blow this up for you. I'm sorry.

18 A. This is the time period from 1996.

19 Q. Okay. Now, drawing your attention to page 11 of
20 Plaintiff's Exhibit 767, I think you were talking about
21 the choice device; is that right?

22 A. That's correct.

23 Q. How did this affect your opinion?

24 A. So, if you look at the definition of a choice
25 device, what it says is "A logical input device used to

1 make a selection from a set of predefined menu options in
2 a graphical system. A typical physical device is a
3 function keyboard or a set of function keys."

4 So, what's important here is that last part,
5 "A typical physical device is a function keyboard or a
6 set of function keys." And that's describing the
7 function keyboard or a set of function keys as being
8 what's on this device.

9 We may think about a keyboard as being lots of
10 keys, but what this is saying is it doesn't have to have
11 lots of keys. It can have a few keys and it still be a
12 keyboard.

13 Q. Now, if Apple were to come in and say this is
14 actually not literally a keyboard, what's your response
15 to that?

16 A. Well, first of all, I would disagree. I think
17 that this is literally a keyboard, that these buttons on
18 here are literally a keyboard.

19 But even if it's not literally a keyboard,
20 it's equivalent to a keyboard because the differences
21 between a full desktop keyboard and the buttons on here
22 are insubstantially different for performing this
23 function.

24 Q. The function is?

25 A. It's not this function; it was the function from

1 1035.

2 Q. Let me put that back up on the screen.

3 A. Right. This function, for "accepting control
4 commands from a user."

5 Q. So, how --

6 A. The difference --

7 Q. Sorry. Go ahead.

8 A. The difference with respect to a keyboard versus
9 the keys on here is insubstantially different. It's
10 equivalent, because they're both accepting control
11 commands from a user.

12 Q. How do you, with a big full-size alphabetic
13 keyboard -- what does the computer do to accept control
14 commands?

15 A. What actually happens is you physically press the
16 key and it makes an electrical connection and that
17 electrical connection goes to the processor and the
18 processor says, "Oh, the H key was hit." And then it
19 goes and starts trying to process that.

20 The same thing here. When one of these
21 buttons is pressed, a signal is --

22 Q. Sorry. You're referring now to an iPod?

23 A. Yes, sir. It is the iPod classic 3. When one of
24 these buttons is pressed, it sends a signal to the
25 processor so that the processor can handle that command.

1 Q. Did you find anything in the patent that informed
2 your view of whether it's important that this keyboard
3 have a lot of keys or a few keys?

4 A. I did. The patent specification talks about one
5 of the ways of accepting control commands or something
6 that could be one of the ways of accepting control
7 commands. I believe it's in about column 36.

8 Q. Okay. I'll take you to column 36. This is
9 Plaintiff's Exhibit 1, at page 27. And is this the right
10 portion of the patent?

11 A. Yes, it is. I think it's about line 14.

12 Q. I'm going to draw your attention to the paragraph
13 starting about line 32. Is that where you were directing
14 me?

15 A. That's right. "Allows the player to be more
16 interactive" -- oh, here it is, "The ability to navigate
17 the program using only audio prompts and/or small number
18 of buttons for a user interface make the playback system
19 which utilizes these features of the invention
20 particularly attractive."

21 Q. And how did that inform your opinion?

22 A. That's another piece of evidence that comes
23 directly from the patent that says if somebody were to
24 argue that the keys on this iPod classic 3 aren't
25 literally a keyboard, that it would at least be

1 equivalent.

2 Q. Dr. Almeroth, have we now -- have you now
3 explained some of the evidence for why the iPod classic
4 meets all of the limitations required in limitation 1C of
5 the '076 patent?

6 A. Yes, that's correct.

7 Q. And should we now check that element off?

8 A. Yes, please.

9 Q. All right, Dr. Almeroth. Turning to element 1D
10 now, the "means for continuously reproducing said program
11 segments in the order established by said sequence." Can
12 you explain what that is from the user's point of view?

13 A. Sure. From a user's perspective, if you have
14 songs on the device and you're playing a playlist, you
15 need the ability to continuously reproduce, continually
16 play the song so there's no hiccups in the song, play the
17 song and then when the song ends, to be able to go to the
18 next song on the playlist, to be able to play all of the
19 songs in a playlist in the order that's specified by the
20 playlist.

21 Q. Is there a definition of the means and the
22 structure for this claim?

23 A. Yes, there is.

24 Q. I'm showing you now Demonstrative 1037. Is that
25 the definition?

1 A. Yes, it is.

2 Q. This one looks a little longer.

3 A. It is a little bit longer.

4 Q. Is it going to take a little more effort to get
5 through this one?

6 A. A slight amount.

7 Q. All right. Let's go to work.

8 What can you tell us about the function
9 identified for element 1D?

10 A. The function is very similar to the claim
11 language. "Continuously reproducing said program
12 segments in the order established by the sequence in the
13 absence of a control command."

14 Q. Now, just focusing on the function, did you find
15 that the classic 3 performs the identical function as
16 element 1D?

17 A. Yes, it does.

18 Q. Let's take the structure one part at a time. All
19 right?

20 A. Yes, sir.

21 Q. So, could you start with the first part of the
22 structure and explain what this is?

23 A. Yes. The structure here -- again it uses the word
24 "equivalents." But the structure here has two parts.

25 There is a hardware -- set of hardware components, and

1 then there is a software algorithm. So, the first part
2 that I want to talk about is the hardware components that
3 are required.

4 It says there "A sound card that includes a
5 digital-to-analog converter, headphones or one or more
6 speakers, and a general purpose computer programmed to
7 perform the algorithm" that's described in Figure 3 --
8 which I showed previously a couple of items in figure --
9 or including specifically the following steps. That's
10 what the court has laid out for the function and
11 structure for this limitation.

12 Q. All right. Let's take it one bite at a time.
13 What's a sound card?

14 A. A sound card is a part of a device that can
15 convert songs stored on a disk that are digital and
16 represented as 1s and 0s and convert that into analog.
17 And the analog is the stuff that will come out of the
18 device that goes into your ear. It's the air vibrations.
19 That's the analog signal. And it can do that through
20 headphones or speakers.

21 Q. In plain terms, is the digital the 1s and 0s that
22 might be stored on the hard drive?

23 A. Yes, sir.

24 Q. And is the analog the electricity in the wire
25 going to the speaker?

1 A. Yes.

2 Q. I realize that might be an oversimplification; but
3 for our purposes, is that a high-level description?

4 A. Yes, it is. You can think about getting from the
5 disk and how it's stored into your ear.

6 Q. This definition refers to a sound card with a
7 digital-to-audio converter. Is that what that is?

8 A. That's exactly what it does.

9 Q. What is a sound card? Is that hardware or
10 software?

11 A. It's hardware.

12 Q. Now, what did you find in the iPod classic 3 that
13 is either a sound card with a digital-to-analog converter
14 or the equivalent?

15 A. There is a -- the structure that provides the
16 digital-to-analog converter -- the sound card -- is a
17 chip by a company called "Wolfson." It's a digital
18 signal processor that does the digital-to-analog
19 conversion.

20 Q. Is the chip a piece of computer hardware?

21 A. Yes. It's one of the components that goes onto a
22 circuit board.

23 Q. How did you determine that the iPod has a Wolfson
24 chip?

25 A. Through the bill of materials and also through the

1 chip schematics.

2 Q. Okay. I'm showing you now Exhibit 325 --

3 Plaintiff's Exhibit 325. Is that the bill of materials?

4 A. Yes. We've seen this once or twice before.

5 Listed in here is the digital-to-audio
6 conversion DSP that's used as part of the iPod classic 3.

7 Q. This is really tiny; so, I'll try to blow up the
8 right part. You tell me if I've done that.

9 Is that it?

10 A. Yes, it is. It's right here (indicating), Wolfson
11 Microelectronics. There is a number there that's pretty
12 hard to read. It's WM8731LEFL.

13 Q. WM1783LEFL, is that it?

14 A. No. WM8731LEFL.

15 Q. All right. What's the significance of that?

16 A. That is the number of the chip -- the one that's
17 actually used in the classic 3. And it talks here about
18 a codec that's used for doing the decoding from the
19 digital into the analog.

20 Q. What does a codec have to do with a sound card?

21 A. That is the chip that is the sound card.

22 Q. Now, were you able to look at any other documents
23 that gave you information about using a Wolfson CODEC in
24 the iPod classic 3?

25 A. Yes. Now we can go a layer deeper and look at the

1 hardware schematics.

2 Q. Okay. I'm now showing you Plaintiff's Exhibit 89.
3 Is that the chip schematic for the iPod classic 3?

4 A. Yes. And the part that we're interested in here
5 is what's going to be on page 7 for the audio
6 digital-to-analog converter that I mentioned previously.

7 Q. Let's just get oriented. Again, this is using
8 this code name iPod Q14?

9 A. Classic 3. Q14 is classic 3.

10 Q. And what is this page of the chip schematic?

11 A. This is the table of contents that lists the
12 different components with different diagrams that are
13 related to the different structures that are on this
14 page.

15 Q. So, we're looking here for the audio DAC at which
16 page?

17 A. That's at page 7.

18 Q. And what are we going to find on page 7?

19 A. What we'll find is a chip. It will be represented
20 as a rectangle; and that chip will have a number of
21 inputs and outputs, very small wires or parts of the
22 circuit board that will connect that digital audio
23 converter to other parts of the device.

24 Q. All right. Let's look at page 7 of Plaintiff's
25 Exhibit 89. Is this it?

1 A. Yes, it is.

2 Q. I realize it's hard to see. I'll blow up the
3 relevant part of the drawing.

4 A. Right. That's about right here (indicating).

5 Q. Okay. If we blow that up, what do we see?

6 A. I understand it's a little bit hard to see. But
7 if you look at the number that's on this rectangle right
8 here (indicating), that's the WM8731LEFL that is the
9 Wolfson digital-analog converter.

10 Q. And just to be clear, this is a drawing that shows
11 what with respect to an iPod? What parts are we looking
12 at?

13 A. This is the part here -- this is the chip
14 (indicating), and then these (indicating) are the lines
15 coming into and out of that chip that connect to other
16 places on the circuit board and other parts of the
17 circuit board. For example, the headphones amplifier is
18 on here as well.

19 Q. And if you'd just point to one of the devices,
20 where is the chip inside the iPod?

21 A. It's on the inside. You'd have to open it up to
22 see the circuit board that sits behind -- inside this
23 case.

24 Q. All right. Now, Dr. Almeroth, in your opinion, as
25 one of skill in the art -- or looking from the

1 perspective of one of skill in the art, as of 2001 was
2 the Wolfson CODEC, or DSP, identical or equivalent to a
3 sound card that is stated in this claim for the
4 digital-to-analog converter?

5 A. Yes, it is.

6 Q. All right. Dr. Almeroth, just taking this one
7 bite at a time again, after the sound card, the next
8 piece of structure is headphones?

9 A. Yes, it is -- or one or more speakers. That's
10 correct.

11 Q. Did you find that the iPod classic 3 has either
12 speakers or a headphone?

13 A. It does. It comes with a set of headphones. They
14 were called "earbuds."

15 Q. And if we look at Plaintiff's Exhibit 108, the
16 user guide, did you find some evidence in the user guide
17 that's relevant to this question?

18 A. Yes. There's a picture that describes the things
19 that come with the device; and one of the things that
20 comes with the device here then is the headphones, the
21 Apple headphones that come with it.

22 Q. I'm showing you now page 44 of the user guide,
23 Plaintiff's Exhibit 108. Is this what you were referring
24 to?

25 A. Yes, sir, that's correct.

1 Q. And what does the user guide tell you about the
2 headphones?

3 A. It tells you to plug them into the headphones port
4 and then place them in your ear. Sometimes they're
5 straightforward like this and --

6 MR. STEPHENS: Objection, your Honor. I don't
7 believe this is in his expert report.

8 THE COURT: Does he have this exhibit in the
9 report or --

10 MR. HOLDREITH: Yes, sir.

11 THE COURT: Where?

12 MR. HOLDREITH: It's in the summary which is
13 one of the appendices to the report that --

14 THE COURT: Do you have that -- all right.
15 We'll look at that at the break.

16 MR. HOLDREITH: Yes, sir.

17 THE COURT: Overruled for now. Go ahead.

18 MR. HOLDREITH: Yes, sir.

19 BY MR. HOLDREITH:

20 Q. Dr. Almeroth, the third bite in this physical
21 structure is a general purpose computer programmed to
22 perform an algorithm.

23 A. Yes.

24 Q. Did you find that in the iPod?

25 A. Yes, I did.

1 Q. Can you explain that?

2 A. Certainly. A general purpose computer is the
3 basic components of a computer. It has a processor, it
4 has RAM, it has a power source, all of the things that
5 make up a general purpose computer or a device like one
6 of these. And I looked in the bill of materials and the
7 hardware schematics and confirmed that this device is, in
8 fact, a general purpose computer and that it has a
9 processor and it has the ability to execute computer
10 software code that corresponds then to that algorithm
11 that's on the page.

12 Q. Dr. Almeroth, have we now found all of the
13 physical structures that are listed on the definition
14 that relates to this claim element?

15 A. Yes, we have.

16 Q. All right. Let's now talk about the algorithm.

17 THE COURT: Okay. Ladies and gentlemen, we're
18 going to take a break. I'll ask you to be back at half
19 past.

20 (The jury exits the courtroom, 3:13 p.m.)

21 MR. HOLDREITH: Your Honor, I'm reading from
22 page 50 of Dr. Almeroth's second amended report
23 concerning infringement, dated February 28th of 2011. On
24 page 50 --

25 THE COURT: Wait, wait, wait, wait. The

1 second one dated what?

2 MR. HOLDREITH: February 28th of 2011, sir.

3 I can give you a cite from the third. I'm
4 sorry. I have the second one up. It's still page 50 in
5 the third, paragraph 88.

6 THE COURT: Okay. Tell me the page again.

7 MR. HOLDREITH: Yes, sir. Page 50.

8 THE COURT: Okay. Mr. Stephens, why is it
9 you're thinking that he didn't mention earbuds and so
10 forth in the report?

11 MR. STEPHENS: That's not the point, your
12 Honor. The point is he was saying specifically that
13 Apple tells people to plug them together. That's not
14 what this says. This says that there is a headphone jack
15 there to allow for the output of sound on connected
16 headphones. It's the difference between proving
17 inducement and a mere capability.

18 THE COURT: And the reference in the
19 exhibit -- in other words, you were using an exhibit
20 there. I took it it was from one of the manuals. Where
21 is that referenced in the report?

22 MR. HOLDREITH: Yes, sir. I've been handed a
23 note. It's Exhibit 3 to the report at page 46. The
24 image is reproduced. And that's Dr. Almeroth's summary
25 of his supporting evidence.

1 MR. STEPHENS: That's the exhibit, your Honor,
2 but not the statement that Apple tells people to plug the
3 headphones into --

4 THE COURT: Okay. Just a minute,
5 Mr. Stephens. Again, counsel, where in your report --
6 you ought to have this memorized. I don't. So, you're
7 going to have to tell me what page it's on.

8 MR. HOLDREITH: Yes, sir. Exhibit 3 to the
9 report.

10 THE COURT: Okay. Now, keep in mind the
11 report you gave me -- all right. Here is an Exhibit 3.

12 MR. HOLDREITH: Page --

13 THE COURT: And that is Personal Audio's
14 responsive chart to Apple's invalidity expert; so, that's
15 what I've got as Exhibit 3 in what you handed me.

16 MR. HOLDREITH: That's correct, sir.

17 THE COURT: Okay.

18 MR. HOLDREITH: Page 46.

19 THE COURT: And that Exhibit 3 doesn't have 46
20 pages. It has 6 pages, the one that you gave me.

21 MR. HOLDREITH: There is a summary that's
22 quite thick. It's about 300 pages, which is his
23 Exhibit 3. I can hand up a copy of it, your Honor, if
24 that would be helpful.

25 (Off-the-record discussion between the court

1 and law clerk.)

2 MR. STEPHENS: Your Honor, I've got it here.
3 I can hand it up if you'd like.

4 MR. CORDELL: Your Honor, may I?

5 THE COURT: Yes, please.

6 MR. STEPHENS: That's about putting it in your
7 ear, not putting it in the iPod.

8 THE COURT: I'm not sure which report you're
9 talking about because it isn't the copy -- I mean, I've
10 mentioned before that I actually review these things and
11 for some reason you're talking about pages and exhibits
12 and so forth that we didn't get or maybe are labeled
13 differently or something. So, if you've got another copy
14 or a couple copies of reports out there that were
15 exchanged, please see Ms. Mullendore so I can take a look
16 at them.

17 MR. HOLDREITH: I apologize for the confusion,
18 your Honor.

19 THE COURT: I'm not sure -- I'm not finding
20 any 300-page Exhibit 3 listing anything.

21 MR. HOLDREITH: Your Honor, if I may --

22 THE COURT: There are some exhibits by
23 letters; and there are some little small exhibits by 1,
24 2, 3. What we're going to do is we're going to go ahead
25 and take the recess. If you can come up with this, it

1 would be helpful to look at.

2 MR. HOLDREITH: If I can explain, your Honor.
3 There are 25,000 pages of exhibits of which this is one.
4 So, I can certainly provide the court with that box.
5 They're also in binders behind Dr. Almeroth.

6 THE COURT: Well, again, he's made the
7 objection. You need to show where it is.

8 MR. HOLDREITH: Yes, sir.

9 THE COURT: It's not really his job to show
10 it; and, as I said before, if I have the reports, I can
11 go through them. But without them, I can't. So, why
12 don't you figure out where it is in this report, if it
13 is, and then let Ms. Mullendore know. Okay?

14 MR. HOLDREITH: Yes, sir.

15 THE COURT: We'll be in recess.

16 (Recess, 3:19 p.m. to 3:29 p.m.)

17 (Open court, all parties present, jury not
18 present.)

19 THE COURT: All right. Let me be sure I
20 understand the objection, Mr. Stephens. You're saying
21 that the Apple user manuals or instructions, whatever
22 that comes when you buy the thing, don't tell the user to
23 plug it in or you're saying his report didn't say that
24 Apple says to plug it in?

25 MR. STEPHENS: So, your Honor, they explicitly

1 have dropped all claims of indirect infringement
2 including inducement and contributory infringement.
3 So --

4 THE COURT: Okay. But answer my question.

5 MR. STEPHENS: I was about to. I apologize.
6 So, his report does not say that.

7 THE COURT: Okay. The instructions do say
8 plug it in and they come with the little earphones, but
9 you're saying his report doesn't say somewhere that they
10 say -- you say that he doesn't say that you say the
11 earbuds are supposed to be put in. Is that what you're
12 saying?

13 MR. STEPHENS: That's correct, your Honor.

14 THE COURT: Okay. Overruled.

15 (The jury enters the courtroom, 3:30 p.m.)

16 THE COURT: And just for record purposes,
17 based on the diagram and what's there in the report, I'll
18 overrule that.

19 Go ahead, counsel.

20 MR. HOLDREITH: Thank you, your Honor.

21 BY MR. HOLDREITH:

22 Q. Dr. Almeroth, I just want to go back for a second
23 because there was a little discussion about this page of
24 the user manual which is Plaintiff's Exhibit 108 at page
25 44. What was it you were about to point out on that

1 document?

2 A. This is the "Plug them into the headphones port,
3 then place the earbud in your ear as shown." That comes
4 from the Apple user guide for classic 3.

5 Q. And did you conclude that the earphones are
6 designed and intended to be plugged into that ear port
7 and used to listen to music?

8 A. Yes. That's correct.

9 Q. All right. Let's go ahead and move to the
10 algorithm now in element 1D that we're looking at that
11 comes under the structure.

12 A. Yes, sir.

13 Q. Is that set forth in these three steps at the
14 bottom of the definition?

15 A. Yes, it is.

16 Q. Dr. Almeroth, can you just remind us what an
17 algorithm is?

18 A. An algorithm is a set of software instructions
19 that are part of the device. Those instructions are
20 executed by the processor, and they perform as the steps
21 indicate.

22 Q. Just so you can relate this to your description of
23 the patent, I'm going to put up a board. I'm now showing
24 you Demonstrative Number 1010. Is the set of steps for
25 element 1D -- is that related to these algorithms that

1 are shown on the board somehow?

2 A. Yes, it is.

3 Q. And can you explain that a little bit?

4 A. Certainly. The algorithm says before it gets to
5 the three steps -- it says (reading) the algorithm that
6 is illustrated in the flow chart at Figure 3 at
7 Items 233, 235, 237, 239, and 261 -- that's correct.

8 Q. And is that one of these algorithms listed on the
9 board?

10 A. Yes, it is. It's continuous play, and then there
11 are two further citations to the patent at -- the '076
12 patent at column 12, lines 10 through 13 and lines 21
13 through 25.

14 Q. Okay. So, for these three steps in element 1D
15 shown on this board, 1037, are we talking about the
16 continuous play algorithm generally?

17 A. Yes, we are.

18 Q. All right. Dr. Almeroth, let me start by asking:
19 Did you find this algorithm for 1D or its equivalent in
20 the iPod?

21 A. Yes, I did.

22 Q. And how do you go about finding out if this
23 algorithm is in the iPod?

24 A. There are a couple parts. The main part is to
25 look at the source code and find the steps of the

1 algorithm in the source code itself.

2 Q. So, is this one where you have to actually go in
3 and read the computer code?

4 A. Yes, sir. This was one of the reasons that I had
5 to go to Houston and look at the source code on the Apple
6 black box.

7 Q. Are you able to determine if this algorithm is
8 present just by pushing the buttons on the iPod and
9 seeing if it plays continuously?

10 A. No. That would have been insufficient. It might
11 have helped me show that the function is present. But
12 with respect to the structure and the algorithm and the
13 steps in the algorithm, that, I would have had to look
14 much deeper to look at the source code to find that
15 algorithm.

16 Q. Now, at a very high level, can you tell us just
17 what's going on with these three steps? What's happening
18 inside the computer?

19 A. Certainly. The easiest way to understand what the
20 algorithm does at a high level is to look at the first
21 couple of words. What you're doing is for continuous
22 play, the first step is to begin playback. Once you've
23 begun playback, you play until that song completes; and
24 then you transition to the next step. When playing that
25 song finishes, you then now have to determine what the

1 next segment is by looking at the playlist and saying,
2 "What's now the next song?"

3 Once you look at that next song and figure out
4 what it is and where it's stored on the device, you then
5 play that song. And then Step 3 says to repeat that
6 Step 2 to keep working through the songs on the playlist
7 until you get to the end.

8 Q. All right. Now, is this in the printed source
9 code in the part that you were able to print out?

10 A. Yes, it is. There is an exhibit with about 300
11 pages of source code that I printed, and I printed the
12 parts of the source code that were relevant to the steps
13 of this algorithm.

14 Q. Dr. Almeroth, do you have a thin binder there
15 which refers to Exhibit 771? Yes?

16 A. Yes, sir, I do.

17 Q. Okay. And I'm not going to put it up on the
18 screen; but looking at 771A, is that one of the tabs in
19 your notebook?

20 A. It is.

21 Q. And without disclosing the contents, can you
22 explain what 771A is?

23 A. At a high level, what 711A [sic] -- plaintiff's
24 exhibit -- is, it's a description of the functions, which
25 files those functions are found in, and the line numbers

1 in that file.

2 THE COURT: Okay. Excuse me. We went from
3 771A to 711A. Let's get the numbers correct, please.

4 MR. HOLDREITH: Yes, your Honor. It should be
5 771A.

6 THE WITNESS: I'm sorry.

7 BY MR. HOLDREITH:

8 Q. Do I have it wrong?

9 A. No.

10 Q. All right.

11 A. I have it wrong. It's Plaintiff's Exhibit 771A.

12 MR. STEPHENS: Your Honor, we object to this
13 exhibit. This is one of the Rule 1006 summaries that
14 your Honor has already ruled --

15 THE COURT: Okay. I'm trying to find my copy
16 of it.

17 MR. HOLDREITH: Your Honor, for convenience, I
18 bound it separately in a small binder. I'm now asking
19 about the A tab, which is a thinner document after the
20 first large document.

21 THE COURT: All right. Why don't you, if
22 you're going to use it and talk about it, first establish
23 how it was prepared.

24 MR. HOLDREITH: Yes, sir. I was --

25 THE COURT: It doesn't do any good to go

1 through all of this and then have him object. I mean,
2 let's see if you can lay a predicate, let him make his
3 objection, and then we'll decide whether or not he can
4 talk about it.

5 MR. HOLDREITH: Yes, sir. That's exactly
6 where I was going.

7 BY MR. HOLDREITH:

8 Q. Dr. Almeroth, as I said, without disclosing the
9 substance, can you explain what this document is?

10 A. Yes. It is the functions that I've identified
11 that relate to specific claim limitations. Those
12 functions are found in a particular file. So, for each
13 function I've included a file name; and then I've also
14 included the line numbers that correspond to where that
15 function is found in the file name.

16 This summary contains the description of the
17 source code for each of the limitations that has an
18 algorithm or relates to the source code for -- in this
19 case for the iPod classic Generation 3.

20 THE COURT: Okay. Let's not get too basic.
21 But if you read this record, maybe you should start off
22 with which patent he's speaking about and then which
23 claim he's speaking about and then what we have there or
24 you have no identification.

25 MR. HOLDREITH: Yes, sir. He got a little

1 ahead of me. I'll step through it piece by piece.

2 BY MR. HOLDREITH:

3 Q. I'm going to ask little questions, Dr. Almeroth --

4 A. Yes, sir.

5 Q. -- just to get the basics; and then you can
6 describe them more general.

7 Is this a summary of the source code that you
8 printed out where you prepared your narrative summary of
9 how that source code operates?

10 A. Yes, it is.

11 Q. And did you take your summary directly from the
12 source code that's printed out as Exhibit 713?

13 A. Yes, I did.

14 Q. In your summary are you translating the computer
15 language into more human readable language?

16 A. That's correct. I am.

17 Q. Did you fairly and accurately summarize those
18 parts of the code that you found to be important to this
19 algorithm?

20 A. Yes.

21 Q. Did you organize your summary by claim
22 limitations? 1D, for example?

23 A. Yes, I did.

24 Q. Okay. And is the source code that you summarized
25 in this document voluminous?

1 A. Very much so.

2 Q. Is the source code available here in the courtroom
3 for inspection by Apple's lawyers?

4 A. Yes, it is.

5 MR. HOLDREITH: Your Honor, I offer
6 Exhibit 771A under Rule 1006 as a summary of voluminous
7 documents to aid the court and the jury to understand
8 voluminous documents that can't be conveniently examined.

9 THE COURT: And my guess is every lawyer in
10 the room knows exactly which patent and which claim
11 you're talking about, but you still haven't stated that
12 for the record.

13 MR. HOLDREITH: I apologize, your Honor. It
14 is '076 claim 1.

15 BY MR. HOLDREITH:

16 Q. Is that right, Dr. Almeroth?

17 A. It includes more than claim 1. It includes more
18 than claim 1. It's claim 1 of the '076, claim 2,
19 claim 3, claim 14, and claim 15.

20 MR. HOLDREITH: I now offer Exhibit 771A under
21 Rule 1006.

22 THE COURT: Okay. State your objection.

23 MR. STEPHENS: Your Honor, we object. This is
24 not the summary of writings, recordings, or photographs
25 under Rule 1006. This is Dr. Almeroth's opinions about

1 infringement. If this were just a compilation of source
2 code, it might be different; but he is expressing
3 opinions here about how the source code works and what
4 claim elements they relate to. This is really nothing
5 more than moving a rewritten expert report into evidence,
6 your Honor.

7 There is no underlying writing, recording, or
8 photograph that this summarizes because there is no
9 underlying writing, recording, or photograph that maps
10 the claim elements onto source code.

11 THE COURT: All right. Given the complexity
12 of the case and the complexity of trying to in some way
13 put it in a method or a structure that a jury can look
14 at, I'm going to allow this in as a summary of what the
15 doctor's opinion is as to what the source code says as to
16 each of these.

17 Now, ladies and gentlemen, just because he
18 says it's his opinion as to what the underlying source
19 code says doesn't mean you have to take that. You're
20 going to be instructed that you will evaluate every
21 witness, including all of those who are allowed to give
22 opinions, based on whether you believe them or not and
23 whether you believe all or any part of their work.

24 Given the nature of this case and the
25 complexity of it, I am going to allow him to admit this

1 as basically a summary of his opinion as to what the
2 underlying source code is stating as to these various
3 elements.

4 MR. STEPHENS: May I say one more --

5 THE COURT: It is not -- and I will grant you
6 it is -- go ahead.

7 MR. STEPHENS: He hasn't even testified to any
8 of this yet, your Honor.

9 THE COURT: Well, I'm going to let him go
10 through that. He's going to have to go through it and
11 explain what he said. But as of yet, if that's your
12 objection to allow him to talk about it, to try to
13 testify about it, I'm going to overrule that.

14 MR. STEPHENS: I understand.

15 THE COURT: I mean, he hasn't offered it yet
16 because -- counsel is right. He hasn't -- your witness
17 hasn't explained it. But I'm going to allow him to go
18 through it, and in the end I'll decide whether the whole
19 exhibit actually comes in as an exhibit or whether you've
20 been able to use it as a demonstrative.

21 MR. HOLDREITH: Thank you, your Honor.

22 THE COURT: Okay. But I'm going to allow him
23 to testify about it. Otherwise, he could never get to
24 show whether he has actually testified about it or not.

25 MR. STEPHENS: Well, your Honor, he has his

1 report, of course, which --

2 THE COURT: I understand that. I mean, I do
3 understand -- given the size of the reports in this case
4 and the problems there, I understand that. But on the
5 other hand, there are -- I'm going to give the witness
6 some leeway to try to condense down his testimony and put
7 it in a form that's understandable to the jury.

8 MR. STEPHENS: But, your Honor, he should have
9 done that in his report instead of giving us a document
10 done with 25,000 pages. Now they've slimmed it down and
11 made it much more palatable and understandable. We
12 didn't have the benefit of that in this case until they
13 produced this or gave this to us in the last day or so.

14 THE COURT: Okay. That objection is
15 overruled.

16 MR. STEPHENS: Thank you.

17 THE COURT: Go ahead.

18 BY MR. HOLDREITH:

19 Q. Dr. Almeroth, let me start with this. Was this
20 summary in your original report that you provided months
21 ago?

22 A. Yes, it was.

23 Q. And is that something that was provided to Apple
24 months ago?

25 A. Months ago, yes, sir.

1 Q. Okay. Dr. Almeroth, using that summary, can you
2 now explain to us how you found the algorithm that's
3 shown for element 1D in the source code for the Apple
4 iPod classic 3?

5 A. Yes. The way that I found it was to search
6 through the source code files and to find the steps of
7 the algorithm inside of that source code.

8 Q. Can you walk us through that summary at a high
9 level?

10 A. Certainly. At a high level, what is happening and
11 what's described in this summary is in the source code
12 you select a song to begin playback. And once you've
13 selected that song and begun playback of that song, that
14 song will continue, as long as the user doesn't enter any
15 commands, until that song ends. And when that song is
16 over, other code will be called to say, "The song is
17 over. I now have to figure out what the next song on the
18 playlist is." And once that song is determined, then
19 that song will be played. And then you repeat that step
20 until the end of the playlist.

21 Q. Now, without going into deep detail, can you show
22 us, using the code, your method for finding these
23 algorithms?

24 A. Yes, I can.

25 Q. Okay. Where should we start?

1 A. In Plaintiff's Exhibit 713. That is the excerpt
2 of code that I printed for the iPod classic 3. It's
3 about 300 pages. It represents all of the functions and
4 line numbers and files that were cited in this
5 Exhibit 771A.

6 Within this source code then, I would like to
7 go to page 120.

8 Q. All right. Here we go. 120, did you say, or 121?

9 A. 120.

10 Q. Okay. 120. Is this the page (indicating)?

11 A. It looks -- yes, it is. And if you could blow up
12 the source code from about here (indicating) down through
13 this function.

14 Q. This part here (indicating)?

15 A. Yes, sir. Okay.

16 Q. What is this?

17 A. Source code. And this is source code for a
18 function called "SelectSong." These initial three --
19 four lines are what are called "comments." All of the
20 comments start with a "///." There is another comment
21 here (indicating), another comment here (indicating).
22 Those are instructions not to the processor, but they're
23 written by the programmer so somebody reading this code
24 would understand what's happening in this code.

25 Otherwise, what you see here (indicating) is a

1 computer language called the "C programming language,"
2 just the letter C is the name of the language. And you
3 see that there is a function here (indicating), and this
4 is the identifier. This is the title of the function,
5 and it's called "SelectSong."

6 Q. Let me stop you there, Dr. Almeroth, just to
7 understand. So, does the computer ignore these lines
8 that start with two slashes?

9 A. Yes. They're just for a human reading the source
10 code.

11 Q. Why would you put comments for a human in source
12 code?

13 A. Because the word "SelectSong" is easier and more
14 quickly to understand than looking through all of the
15 details in here. So, it's basically a signpost that says
16 this is the function called "SelectSong."

17 Q. You called this a function. What does a function
18 mean?

19 A. A function is a collection of specific source code
20 statements that performs a slightly higher function. All
21 right? So, the higher-level function here is the
22 selection of a song. And now we have to break that down
23 into a bunch of specific program instructions.

24 Q. All right. Continue.

25 A. Part of the function is what's called a

1 "variable." And a variable is a part of the memory that
2 stores some information. The variable name that I want
3 to point to here is "index." And what "index" is is it's
4 a number that represents where in the playlist you've
5 selected the song.

6 Q. Is that like the --

7 MR. STEPHENS: Objection, your Honor. Again
8 this is not in his report. His report doesn't go into
9 anywhere near this level of detail.

10 THE COURT: Overruled.

11 A. The index is the place in the playlist that you're
12 currently at.

13 And the way that this function is called is
14 either with selecting on a playlist or selecting --
15 scrolling through the playlist and selecting on a
16 particular song. Then this function is called that says,
17 aha, I either want to play the first song on the list; or
18 if the user has scrolled down and wants to play the
19 seventh song on the playlist, then that will be
20 represented by this information that's passed into the
21 program.

22 BY MR. HOLDREITH:

23 Q. Let me stop you for a second. Is the index a
24 number, like 1, 2, 3, 4, 5?

25 A. Yes, it is.

1 Q. And does it have to do with something to do with
2 are we in the first or second or third or fourth place in
3 the playlist?

4 A. That's correct. This is the index number into the
5 playlist that tells you where it's at. It's recorded as
6 a variable, and it's given a name so that the processor
7 knows, ah, I have to go and use this number to do
8 something.

9 Now what happens is there are some other
10 English language words here that are "if" statements.
11 And what happens in these "if" statements is you'll check
12 a condition. And, for example, the one that
13 Mr. Holdreith has highlighted at 843 says if this index
14 value that you passed in -- and the "!" and "=" means if
15 it doesn't equal. If it doesn't equal an invalid song
16 index -- this is why this takes so long. It's a double
17 negative. It's saying if it doesn't equal an invalid
18 song index. So, it's a valid song index --

19 Q. Wait a minute. Slow down. So, if it doesn't
20 equal an invalid --

21 A. Then it must be valid.

22 Q. Okay. So, you're looking for a valid index here?

23 A. And then -- well, you have a valid index. Okay?
24 It's just a check to make sure that however you got to
25 this part of the code, that you got there with a valid

1 index number. All right?

2 Now what you have to do is

3 "GetIndexedSongPlayState." And just in the interest of
4 time, let me speed up a little bit. And what's most
5 important here is that you do a couple of checks and you
6 eventually get down and it says status equals
7 PlayCurrentSelection. And then again you have this index
8 value.

9 PlayCurrentSelection is another function
10 somewhere off in the code. So, then we have to go and
11 look at that source code. But what I can tell you is
12 I've looked at this source code, and what it does is uses
13 this index number to play the current selection that's
14 identified by that index.

15 Q. Let me stop you for a second, Dr. Almeroth. Do
16 these -- does the PlayCurrentSelection function -- is
17 that just printed as the next thing in this code? Can
18 you just follow it and read it like a book, one page to
19 the next?

20 A. No. Sometimes source code is called a "bowl full
21 of spaghetti." You sort of have to seize on one end of
22 the noodle and follow it all of the way through. This
23 PlayCurrentSelection will potentially be in a different
24 file, certainly in someplace else in the code.

25 Q. So, you have to jump to some completely other page

1 to find out what that does?

2 A. You'll have to remember what was happening here,
3 and then you'll have to go to that source code and make
4 sure that that source code does actually play the current
5 selection.

6 Q. Could you just explain this index that's used to
7 play the current selection? Does that index represent
8 something about the playlist?

9 A. That's right. This index is the same index that
10 was given to this function. There were some checks to
11 make sure that the index was a valid number. Okay. It's
12 a valid number. Okay. Go off and play that current
13 selection.

14 And the idea of PlayCurrentSelection also is
15 that it will return a status, so a status after you try
16 and execute the function. Well, if everything is okay,
17 then no error comes back. If something bad happens, then
18 you get an error that comes back and something has to
19 happen depending on whether there is an error or not.

20 But the one thing I wanted to point out is
21 here is another line that says (reading) if status equals
22 no error. Then what you're going to do is, for example,
23 update the current track and you'll send a message. What
24 this part of the code does right here (indicating) is
25 just update the display.

1 Q. Dr. Almeroth, you're talking about roughly lines
2 857 to 866 now?

3 A. That's correct.

4 Q. Okay.

5 A. And what the user will see then is if they hit a
6 button that plays a playlist or selects a song, this will
7 then play that first song and then update the display.

8 Q. Okay. Have you finished displaying this part of
9 the code?

10 A. Yes, I have.

11 Q. And is there another part of the code that's
12 relevant to your explanation?

13 A. There is. As part of this algorithm, now what you
14 have to do is wait for the song to end. And part of the
15 code that's executed when the song ends is another
16 function called "PlayerDone." Okay? And I've printed
17 out the relative code for PlayerDone, and that's on page
18 200. This was on page 120.

19 If you go to page 200, there will be a
20 function called "PlayerDone."

21 Q. Okay. Am I in the right place?

22 A. Yes. In the middle of the page is another one of
23 these comments that says that this is the function
24 PlayerDone.

25 And if you expand from here (indicating) to

1 about the bottom of the screen, I'll try and explain
2 what's in this source code briefly.

3 Q. About like that?

4 A. Yes, sir.

5 Okay. PlayerDone --

6 Q. We're now looking at -- I'm sorry, doctor --
7 Plaintiff's Exhibit 713 at page 200?

8 A. Yes.

9 Q. Go ahead.

10 A. What happens here is -- let me just skip some of
11 this. Again there are some checks here, some "if"
12 statements that will check some conditions in the code.
13 One of the things that you want to make sure is that the
14 player has stopped so that you're truly at the end of the
15 song, just to make sure that that's correct.

16 You will then continue down; and here is a
17 useful comment, at line 4443 that says "Go to the next
18 track if appropriate."

19 Here it will check some conditions. If you're
20 only playing one song, it will stop. If you have
21 something else going on, it might have to stop. But if
22 you're in a playlist and there's a next song, there is a
23 command on the next page that will call another function.

24 So, you've got some checks to make sure the
25 player is done with the current song and then now you

1 have to go to the next song.

2 Q. Should we go to the next page?

3 A. Yes. And if you could just blow up this part
4 (indicating) right at the top.

5 Q. About here (indicating)?

6 A. Yes, sir.

7 And this is the line, 4459, that I wanted to
8 point out to. That calls yet another function called
9 "PlayerNext." But remember the algorithm required once
10 you got done with a song, you had to find the next song
11 and then go off and play that song.

12 So, this is the part of the source code that
13 then calls "PlayerNext." And I believe this will be one
14 of the last ones we have to look at for this code. But
15 let's briefly look at PlayerNext, and that's on page 196.
16 We have to jump to a different part of the code.

17 PlayerNext starts up here at the top
18 (indicating).

19 Q. About there (indicating)?

20 A. Yes, sir, and probably down a little further.
21 Let's try that, yes, to see if that's --

22 Q. It's a little hard to read. Should I make a
23 smaller box and we'll move it if we need to?

24 A. We will. That sounds good.

25 Okay. So, this is the PlayerNext function.

1 Again, it will do some checks here (indicating). For
2 example, it will make sure that the player is stopped.
3 It will check some other things and move down to the next
4 part of the code. What this "PlaylistItem" is is it's
5 the information about the track. We can go off and look
6 at the file that has playlist information. It will then
7 have track information, and that track information will
8 include the artist and the title and the album and that
9 kind of information about the song.

10 It will also include -- there is a unique
11 number about that song that's called the "Persistent ID,"
12 or the "PID," that uniquely identifies that song; and
13 then it's referenced here based on the PlaylistItem here.

14 Q. Let me stop you right there. Why does the
15 computer use a number to identify a song?

16 A. It's one of several ways of distinguishing that
17 song from all of the other songs. That way when this
18 source code says, "I've found the next song. I want to
19 play that song," it will be able to use the information
20 about the PlaylistItem to figure out where that song is
21 stored, to access that song, and then to play it so it
22 comes out of the speakers.

23 Q. Now, is the number that identifies the song the
24 same thing as the index that says we're now at the first
25 spot in the playlist or the fourth spot or the sixth

1 spot?

2 A. No. That's different. The playlist index is --
3 let me describe it as a more simple number. It just
4 points to where you are on the playlist.

5 That part of the playlist -- here is the
6 playlist -- I'm sort of doing this imaginary playlist top
7 to bottom. And let's say you're on the third song.
8 There will be a corresponding track record information to
9 that song that's stored in the memory somewhere. And
10 when you go from the third song to the fourth song, that
11 will then point to a different part of the memory that
12 has information about the new song.

13 So, you can think about this almost as an
14 index, which is why it's called an "index," that ticks
15 through the playlist; and there is a corresponding part
16 of the memory that points to information about that track
17 as you move through that playlist.

18 Q. All right. What's next?

19 A. Let's see. Let's get rid of this window, and
20 let's focus on the code starting about here (indicating)
21 through the rest of the page.

22 Q. About there (indicating)? A little further down?

23 A. Little further down, little further, little
24 further.

25 Right there, that's good.

1 So, then if you move this box back down so we
2 can see the beginning of it.

3 Okay. Mr. Holdreith, I'm sorry to ask; but if
4 you could resize this box so we can see the rest of the
5 line.

6 Q. Yes. I'll do my best.

7 MR. STEPHENS: Could you also include the line
8 numbers that you're referencing?

9 A. Perfect.

10 BY MR. HOLDREITH:

11 Q. All right. Dr. Almeroth, what line numbers are we
12 looking at here?

13 A. We're starting at line 4123. And just to be
14 accurate, this is on page 196. Let's just talk about
15 this. We'll come back and talk about the file in a
16 second.

17 There is a statement here that says "while
18 (true)." What "while (true)" means is to loop through
19 this code forever. While (true). Okay? The only time
20 that you stop looping through the code is when true
21 becomes false, but true never becomes false. So, you
22 have to have some way in the code to get out of that
23 loop; and there is a couple of different ways called
24 "breaks." So, if the code runs through and it runs into
25 a situation, it will pop out of the code.

1 So, now let's see what this "while" loop does.
2 What it says is -- here's a comment "find the next song
3 in the playlist that actually plays or is selected."
4 What the processor will do is it will loop through this
5 set of instructions, looking through the playlist to find
6 something that actually plays or is selected.

7 Now, one of the instructions it does is it
8 figures out what the nextTrackItem is. And the
9 nextTrackItem calls the function
10 PlayerGetNextPlaylistTrack. That function will look at
11 the index value and increment the index value to get you
12 to the next playlist item. And then this loop here will
13 check to make sure that it's something that can be
14 played. If not, it will loop through again. But if it
15 is something that can be played, now you have the next
16 song that can be played.

17 Q. So, to put it in more simple terms, is this
18 function just looking at the playlist to say, "Okay.
19 Where is the next song I can play?"

20 A. That's correct.

21 Q. Is there any more of this code we need to walk
22 through right now?

23 A. I believe I want to go a little bit further in
24 this code.

25 Q. All right.

1 A. To about line 4139. That's right. Okay. So,
2 what you have here is you'll check another couple of
3 conditions; and as long as you have a song that can be
4 played, you'll call either PlayerPlay or you'll call
5 PlayerSelectInternal. And both of these functions relate
6 to actually playing the song that you come up with next.

7 Now, the way this code will operate is you'll
8 start with SelectSong. It will either be selecting the
9 playlist so it will be the first index item or you can
10 scroll through the playlist and say select Item 6. And
11 then the user will hit "play." It will call the function
12 "SelectSong." That will queue up and play that song.
13 Then when it's done, PlayerDone is called. And
14 PlayerDone says as long as there's other songs on the
15 playlist, I'll call PlayerNext. That will queue up the
16 next song, and then that song will be played.

17 Q. Any more of this code we need to walk through
18 right now?

19 A. No, sir.

20 Q. What you just summarized and showed in
21 Exhibit 713, is that what is summarized in Exhibit 771A
22 for claim 1 of the '076 patent, element 1 -- are we on D?

23 A. Yes.

24 It is.

25 Q. And, Dr. Almeroth, what does that have to do with

1 this algorithm for element 1D which is beginning with the
2 program segment identified by a ProgramID contained in a
3 Selection_Record and so on?

4 A. The source code that I've shown you is the source
5 code that implements these three steps of the algorithm
6 as required by the court's construction.

7 Q. Can you just --

8 MR. STEPHENS: Objection, your Honor. So, I
9 specifically asked Dr. Almeroth in his deposition to
10 identify, for example, the CurrentPlay variable; and he
11 told me he could not do that. What we've had instead now
12 is detailed description using stuff that's not reproduced
13 in his report at all to have that same effect.

14 THE COURT: All right. Can you show me where
15 in the deposition that was?

16 MR. STEPHENS: Yes, I can.

17 It's page 256 of his deposition, starting at
18 line 7. There is a question. I say --

19 MR. HOLDREITH: Could you give me just a
20 second to catch up, counsel?

21 MR. STEPHENS: Yeah, sure.

22 MR. HOLDREITH: I may have an objection to
23 what you're about to read.

24 MR. STEPHENS: 256, the question is at line 7.
25 And then near the bottom of the page starting at line 22,

1 he says he hasn't identified in this text what we're
2 talking about.

3 MR. HOLDREITH: Well -- I'm going to object to
4 the argument, your Honor.

5 THE COURT: Wait, wait. Let me...

6 Okay. I'm looking at the deposition -- and
7 this would be Dr. Almeroth's deposition of May 11, 2011,
8 Volume 1, page 256 to 257.

9 MR. STEPHENS: That's right.

10 THE COURT: It appears to the court that the
11 question was asked. The answer is slightly more
12 extensive -- actually quite a bit more extensive -- than
13 he hasn't identified that one thing. He was pointing out
14 various codes.

15 Keep in mind that the disclosure rules on
16 reports under the Federal Rules and the deposition and
17 this district are not intended as a trap. The disclosure
18 rules -- federal disclosure rules are intended to allow a
19 party to understand what the testimony is going to be
20 about so as to prepare for cross-examination and
21 determine whether or not a deposition is needed.
22 Depositions are then intended to find out what they are
23 going to talk about. It was fairly clear from this that
24 this is what he's going to discuss; namely, the code.
25 The fact that he hasn't recited verbatim every word in

1 his testimony is, in this context, not a valid objection;
2 and I'm going to overrule that.

3 Go ahead, counsel.

4 MR. HOLDREITH: Thank you, your Honor.

5 BY MR. HOLDREITH:

6 Q. Dr. Almeroth, I think we were discussing how the
7 code that you just summarized relates to the algorithm;
8 and I'm not sure if you had a chance to answer that
9 question. Will you just begin to explain that?

10 A. Could you restate the question?

11 Q. Yeah. The code in Exhibit 713 and the functions
12 that you just summarized, can you explain how that
13 relates to the algorithm for element 1D?

14 A. Sure. The code -- the source code that I've cited
15 is the source code inside the iPod classic 3 that
16 executes the algorithm that's described in the court's
17 claim construction for 1D.

18 Q. Now, when you look at the algorithm in the iPod,
19 do you have to find exactly these three steps? Is that
20 how you do the analysis?

21 A. No. It's these steps or the equivalent of these
22 steps. Again, the concept of equivalents can be applied
23 here as well.

24 Q. And for programmers, can you do an algorithm in
25 two different ways that are equivalent that use a

1 different number of steps?

2 A. Yes, certainly.

3 Q. And do you have to find variables that have the
4 exact same names as the variables in this claim
5 construction, like "CurrentPlay" or "Selection_Record"?

6 A. No. They could be different variable names. The
7 information could be stored in a different way inside of
8 the program. It's really about the algorithm as it
9 relates to performing the function.

10 Q. Let me ask you a general question. This source
11 code in the iPod that we just looked at is written in
12 which computer language?

13 A. It's written in C.

14 Q. And was the C computer language written and
15 specified and well-known by 2001?

16 A. Yes, it was.

17 Q. Were all of the instruction -- the functions or
18 commands in C that are used in the code that you
19 summarized, were those all known and parts of C that were
20 available to use in 2001?

21 A. Yes, they were. A computer language has a certain
22 syntax which is how you organize these statements on the
23 page. It has types of statements, like "while" loops,
24 "if" statements, "case" statements. Those are all part
25 of a specification for the programming language. In

1 fact, when I went to school, the way that you would learn
2 a computer language would be to learn what all of these
3 statements meant and what the curly brackets meant.

4 That's what it really means to understand how to learn a
5 language, and then we practiced how to write algorithms.

6 Q. All right, Dr. Almeroth. What is your conclusion
7 with respect to whether the algorithm set forth in the
8 definition of element 1D of the '076 patent is present
9 literally or equivalently in the iPod classic 3 source
10 code?

11 A. It is present.

12 Q. Should I check that one off?

13 A. Yes, please.

14 Q. All right, Dr. Almeroth. We now go to 1E?

15 A. Yes, sir.

16 Q. What is element 1E of the '076 patent?

17 A. It is a "means for detecting a first command
18 indicative of a request to skip forward."

19 Q. And for the user, what does that mean?

20 A. What that means is that the command has been
21 entered and accepted -- that's 1C. And now what you have
22 to do is determine what the character of that command is,
23 meaning determine that in this case it's a request to
24 skip forward. You have to translate a keypress into a
25 request to skip forward.

1 Q. Is this something that happens after the user
2 presses the button?

3 A. Yes, it is. It's a process of translating that
4 button press into, ah, now I have to do something else.
5 And in this case it's skip forward.

6 Q. And is that the computer that's figuring that out,
7 what did that button press mean?

8 A. Yes.

9 Q. Now, I think this one may be one of the few that
10 is not disputed; but I'm not sure. So, I'm going to just
11 have you walk through it quickly. As to the function --
12 and the function, is that recited here in the claim
13 itself?

14 A. Yes, it is.

15 Q. And what's the function?

16 A. It's the "means for detecting a first command
17 indicative of a request to skip forward." That's the
18 function.

19 Q. Does the iPod perform the identical function?

20 A. Yes, it does.

21 Q. And did you review the source code for the iPod to
22 determine if it uses the same algorithm or the equivalent
23 algorithm to the one set forth in the definition for this
24 element?

25 A. Yes, I did.

1 Q. I'm not going to pause on what that definition is,
2 but are you prepared to fully explain that if you're
3 asked about it?

4 A. Yes, I am.

5 Q. Okay. What is your conclusion about whether
6 element 1E is present in the iPod classic 3?

7 A. That it is present and that this limitation is
8 infringed by the classic 3.

9 Q. Should we check that one off?

10 A. Yes.

11 Q. That was easy.

12 A. I agree.

13 Q. This last one, 1F, is this going to be longer or
14 short?

15 A. This actually might be short.

16 Q. All right. Well, let's start with what element 1F
17 relates to, this "means responsive to a first command."
18 What does it mean for the user?

19 A. What that means for the user in the earlier
20 limitations you've accepted -- by "you" I mean the iPod.
21 It's accepted the input. It's determined that it's a
22 skip to go forward. And now what you have to do is you
23 have to make that happen. You have to make the skip
24 forward command happen. The song that's currently
25 playing has to stop, and you have to determine what the

1 next song is and then play that next song.

2 Q. Is this a software algorithm again?

3 A. It is.

4 Q. And is there a definition that relates to this
5 one?

6 A. Yes, there is.

7 Q. Dr. Almeroth, I'm now showing you Demonstrative
8 Exhibit 1040. Is that the relevant definition that
9 relates to element 1F of the '076 patent?

10 A. Yes, it is.

11 Q. Now, let me pause at the function again. Is the
12 function identified at the top of Exhibit 1040 here?

13 A. Yes, it is.

14 Q. And can you just explain briefly what the function
15 is?

16 A. The function is, briefly, to stop playing the
17 currently playing song -- that's discontinuing the
18 reproduction of the currently playing program segment --
19 and instead play the next song in the playlist. That's
20 briefly what that limitation is about.

21 Q. Let me ask you: With respect to the function, did
22 you find that the iPod classic 3 has code that performs
23 the identical function to the one shown on demonstrative
24 1040 which is the definition for element 1F?

25 A. Yes.

1 Q. All right. Let's then look at the algorithm
2 portion. Is that the three numbered steps near the
3 bottom of the board?

4 A. Yes, it is.

5 Q. With a high level of generality, can you explain
6 what this algorithm is?

7 A. Certainly. This algorithm has the steps of
8 figuring out what the next song in the playlist is that's
9 playable and then resetting the CurrentPlay value to the
10 record number indicated by the Selection_Record. Okay?
11 And then you fetch and play that item.

12 What that means at a high level is you've got
13 the playlist. You have to scan through it, find the next
14 playable item; and then you have to make sure that you
15 have the Selection_Record which is the index value, the
16 number that's unique for that particular song, so that
17 you can use that information to then play that song.

18 Q. Now I want to pause on the "segment of the
19 appropriate LocType."

20 A. Yes.

21 Q. At a high-level generality, what does that mean?

22 A. The "segment of the appropriate LocType" is that
23 within the playlist you have to find the item in the
24 playlist that's of the appropriate LocType.

25 Q. And there was some discussion with Mr. Call about

1 LocTypes. Were you in the courtroom for that?

2 A. Yes, I was.

3 Q. He talked about subject announcements, like you're
4 about to hear music.

5 A. Yes.

6 Q. Is that something that could be one LocType?

7 A. Yes. There were subject announcements that were
8 "S." There were "T" for topic announcements. There were
9 program segments which were "P." It was one example from
10 the patent that described different kinds of LocTypes.

11 Q. He also did talk about a music program, a song.

12 A. Right. That's a type.

13 Q. And could that be a LocType of like a program
14 LocType?

15 A. That's right. It would be like a "P," a "P" type.

16 Q. Okay. Now, for this patent claim, did you have to
17 find that the playlist had to have different LocTypes in
18 the same playlist? Did you have to be able to have both
19 announcements and songs?

20 A. No. That's not a requirement of this claim. If
21 you look through what the court has said is the
22 construction for this claim, it doesn't say that you have
23 to have multiple different kinds of LocTypes in a
24 sequencing file, in a playlist.

25 Q. Okay. So, although Figure 5 that Mr. Call

1 testified about shows different LocTypes in one file,
2 announcements and music, does this claim permit you to
3 have all the same LocType, all songs or something?

4 A. Yes, in fact, it does. There is not a restriction
5 in this claim about having subjects or topic
6 announcements or having any requirements about having
7 multiple LocTypes within the playlist.

8 Q. Okay. Now, which one does iPod do? Does it do
9 all programs, or does it do programs mixed with other
10 types?

11 A. The playlists in the iPod all use the same type of
12 content. They're all program files.

13 Q. And, so, does the iPod classic 3 have the ability
14 to store a playlist that's ProgramIDs that just
15 identifies songs and the order that you want to play them
16 back?

17 A. Yes. That's exactly right.

18 Q. And is it insubstantially different --

19 MR. STEPHENS: Objection, your Honor. I've
20 been holding off, but this is a lot of leading going on.

21 THE COURT: I think on questions like this
22 I'll sustain that.

23 MR. HOLDREITH: All right, your Honor. I'll
24 proceed in a more inquisitive fashion.

25 *

1 BY MR. HOLDREITH:

2 Q. Dr. Almeroth, are there substantial differences
3 for the function in this claim between using an ordered
4 list which is just the same type, all programs, or using
5 a list which is different types?

6 A. There are not substantial differences in the
7 function. Again, focusing on the function, it's
8 specifically with respect to the skip command. And the
9 function doesn't require that there be multiple LocTypes
10 or different types of content or subject announcements or
11 any of those requirements as part of the function.

12 Q. So, when you -- does the iPod scan through a list
13 of items in the playlist?

14 A. Yes, it does.

15 Q. And in an iPod, how do you know that the next one
16 is going to be of the appropriate LocType?

17 A. The way that the iPod is specifically programmed
18 is all of the items on the playlist are of the program
19 type. For example, they might all be songs; and the
20 device is specifically programmed to work through the
21 list of programs and determine which is the next one on
22 the list and to be able to play the ones that are
23 playable.

24 Q. Now, if all the members on the iPod playlist are
25 of the same type, if you already know that, do you need

1 to put an extra character into the record identifying
2 that song to tell you what type it is?

3 A. No. You can almost imagine a Figure 5 where all
4 of the types are P and all of the ProgramIDs for the
5 Selection_Records that point to the files are present.
6 When you program that, because all of the Ps are there,
7 you don't actually need to include the P values. I mean,
8 the code is complex enough that you don't have to look at
9 a LocType to determine that the next type of record is
10 program.

11 You know that all of the programs are of that
12 type; and, therefore, when you scan through the file to
13 find the next one, you can just find the next item that's
14 playable.

15 Q. Now, does a code for the iPod classic 3 have a
16 scanning algorithm that looks for the next segment?

17 A. Yes, it does.

18 Q. And is that something you can explain to us with
19 reference to the code?

20 A. Yes, I can.

21 Q. All right. Let's do that. Where should we look?

22 A. This is Plaintiff's Exhibit 713, and this again is
23 the code for the classic 3. This is the 300 pages of
24 excerpt that --

25 MR. STEPHENS: Objection, your Honor. This is

1 inconsistent with his report.

2 THE COURT: In what way?

3 MR. STEPHENS: So, in the report he says
4 that --

5 THE COURT: And what part of the report are
6 you looking at?

7 MR. STEPHENS: I'm looking at Exhibit 3, which
8 is the '076 patent classic 3 product.

9 THE COURT: Okay.

10 MR. STEPHENS: This is page 13.

11 THE COURT: The chart?

12 MR. STEPHENS: Yes, the chart.

13 THE COURT: Okay.

14 MR. STEPHENS: And in the right column, the
15 first paragraph, it says, "The iPod classic performs all
16 of the steps of the algorithm but essentially combines
17 Steps 1 and 2 instead of scanning forward in the
18 sequence" --

19 THE COURT: Okay. I've got a different page
20 13 and a different chart.

21 MR. STEPHENS: Let me make sure I've got the
22 same version, your Honor. I thought it was.

23 I'm sorry, your Honor. I realize the mistake.
24 It's actually Appendix A to Exhibit 3. It's organized in
25 an unusual way.

1 THE COURT: Do you have a copy of that?

2 MR. STEPHENS: I do.

3 THE COURT: Why don't you hand it to
4 Ms. Laurents.

5 MR. STEPHENS: Sure. So, page 13 --

6 THE COURT: Okay. Ms. Mullendore has found
7 it. Okay.

8 MR. STEPHENS: The first --

9 THE COURT: All right. This is part of the
10 infringement contentions, then, right?

11 MR. STEPHENS: Well, this is one of the
12 exhibits, one of the 25,000 pages of exhibits.

13 THE COURT: Okay. But it's part of the -- I
14 mean, it's entitled "Personal Audio Infringement
15 Contentions," if you look on page 1.

16 MR. STEPHENS: Yeah, but it's an appendix to
17 his expert report. It does --

18 THE COURT: Right. It's Appendix A to
19 Exhibit 3, but the title then is "Personal Audio
20 Infringement Contentions." Isn't that on page 1?

21 MR. STEPHENS: Yes, your Honor.

22 THE COURT: Okay. We're on the same deal
23 then.

24 Okay. So, I'm on page 13. What's the
25 problem?

1 MR. STEPHENS: Okay. So, it says -- in the
2 first full paragraph in the right column, it says
3 (reading) the iPod classic performs all three steps of
4 the algorithm but essentially combines Steps 1 and 2.
5 Instead of scanning forward in the sequencing file to
6 locate the next record and then incrementing the
7 CurrentPlay variable, instead, the device increments the
8 CurrentPlay variable to fetch the next record.

9 So, he's saying, in effect, there is no
10 scanning; but he is about to explain a scanning
11 algorithm.

12 THE COURT: Okay. I think the way to handle
13 that is point out what you see to be an inconsistency on
14 cross-examination. I think you're entitled to do that
15 but --

16 MR. STEPHENS: I guess my point is, your
17 Honor, there is no algorithm described in the report; so,
18 why should he be permitted to testify about such an
19 algorithm, for scanning.

20 THE COURT: Okay. And as I said, I think
21 that's an inconsistency that you can point out in
22 cross-examination.

23 What this is about, ladies and gentlemen, is,
24 as you can imagine with the complexity of this, I've
25 ordered the people who are going to be testifying to

1 provide complete reports. And one of the ways that you
2 may use to evaluate their credibility is if it's pointed
3 out that they have come up with something brand-new all
4 of a sudden without having put it in the report before,
5 you can evaluate that. On the other hand, given the
6 complexity, both sides have -- Dr. Almeroth and the
7 doctor working on the other side will have a chance to
8 explain that, and it will be up to you to evaluate that.
9 So, I'm going to overrule the objection; but I will point
10 out that the jury -- that one of the ways you can
11 evaluate somebody is if they're suddenly coming up with
12 something brand-new, that they've never thought of
13 before, why didn't they think of it before rather than
14 just before you.

15 I'll overrule the objection. Go ahead,
16 counsel.

17 MR. HOLDREITH: Yes, sir.

18 And for the record, your Honor, the next line
19 Mr. Stephens did not read says, "This implicitly" --

20 THE COURT: Well, you've got a chance to go
21 over whatever you want with him. You don't need to be
22 testifying.

23 MR. HOLDREITH: Fair enough, your Honor. I'll
24 ask the witness.

25 *

1 BY MR. HOLDREITH:

2 Q. Dr. Almeroth, did you explain -- well, let's start
3 with the answer you were about to give. Can you explain
4 in this code where you found this?

5 A. Yes. This was inside of Plaintiff's Exhibit 713
6 on page 196.

7 Q. Okay. So, I've now gone to page 196 of
8 Plaintiff's Exhibit 713. Is this the right page?

9 A. Yes, sir. And if you expand PlayerNext probably
10 about down (indicating) -- that would be good.

11 Q. Right there (indicating)?

12 A. Yes.

13 Now, what this function is is it's the
14 PlayerNext that we saw before, that I had described
15 previously. The reason why we're at this function now is
16 because the user has pressed the "skip" button. So,
17 instead of waiting for the song to end normally and then
18 finding the next song using this same algorithm, now the
19 user has pressed the "skip" button and prematurely you
20 have to now end that song and then go to the next song.
21 It turns out that different places in the code will
22 trickle down to the same function for PlayerNext here.

23 So, this is the PlayerNext function we saw
24 before. Now this function PlayerStopInternal makes sense
25 in the context of, well, you're in the middle of playing

1 a song or somewhere in playing that song so you have to
2 stop that song.

3 And then if you scroll down below, you'll see
4 the other parts of the algorithm that we saw before, that
5 I've already described, the "while" loop --

6 Q. Should we go down there now?

7 A. Yes.

8 So, this is the "while" loop; and this is --

9 Q. I'm sorry. Which line?

10 A. At 4123.

11 Q. Okay.

12 A. And this is "Find the next song in the playlist
13 that actually plays or is selected." And this is the
14 part of the algorithm that determines what the next song
15 is that needs to be found and played.

16 Q. Now, Dr. Almeroth, this algorithm talks about
17 "fetching and playing the program segment identified by
18 the ProgramID contained in the new Selection_Record."
19 What's that talking about?

20 A. What that's talking about is just like before, as
21 the index value is incremented to go to the next song,
22 you then have to figure out what that song points to that
23 has the information about that song. And that's what's
24 called the "PlaylistItem" and it includes track data and
25 that track data is the album and the artist, the genre,

1 lots of other information and also includes what's called
2 a "Persistent ID," a "PID." And that PID is the
3 information that's used to find that song on the mass
4 storage device.

5 Q. Now, could you just briefly describe what it's
6 talking about when it says "resetting the current
7 Number 2" in this definition, "resetting the CurrentPlay
8 variable to the record number of that Selection_Record"?
9 What's happening there?

10 A. Certainly. As you find the new index value, the
11 index value is going to change because it moves to a
12 different song. Once the index value changes -- for
13 example, from the sixth song to the seventh song -- now
14 what you have to do is figure out what the new track
15 information is, and that's what's referred to as the
16 "Selection_Record." That's the thing that includes
17 information about the song.

18 So, when 6 goes to 7, the song information is
19 going to go from song information about the sixth song to
20 song information about the seventh song. And that second
21 step is about resetting the CurrentPlay variable to the
22 record number of that Selection_Record.

23 Q. Does Apple's source code for the iPod classic 3 do
24 something like that?

25 A. Yes, it does.

1 Q. What does it do?

2 A. Through this part of the algorithm it will add a
3 value to the CurrentPlay so that it goes to the next
4 index value. And that's part of a function called
5 "PlayerGetNextPlaylistTrack."

6 And since you've asked specifically about this
7 part of the algorithm, we probably want to go to that
8 page.

9 Q. Okay. How do we do that?

10 A. That is in -- it's the same exhibit, Plaintiff's
11 Exhibit 713 and now it's on page 194.

12 Q. Okay. We're now looking at Plaintiff's
13 Exhibit 713, page 194. What do we need to see here?

14 A. On this page -- it's down here (indicating). And
15 this is called "PlayerGetNextPlaylistTrack." And we'll
16 see on this code and the next page there is another
17 function that gets called.

18 If you could go to the next page.

19 Q. Okay. And just for the record,
20 PlayerGetNextPlaylistTrack is on which line?

21 A. Line 3975.

22 Q. Okay. Now going to the next page, this is
23 Plaintiff's Exhibit 713 at page 195. What do we see
24 here?

25 A. What we want to blow up is about line 4039. There

1 is a similar "while" loop that's here, but now you call
2 GetNextPlaylistTrack. And I just wanted to show you that
3 this function calls another function calls another
4 function. What I really wanted to get to was this
5 function called "GetNextPlaylistTrack."

6 Q. Okay.

7 A. And that's on page 235.

8 Q. Okay.

9 A. And I promise this will be the last part that we
10 have to show for these steps of the algorithm.

11 Q. Page 235, did you say?

12 A. Yes.

13 Q. All right. About there (indicating)?

14 A. Yes, sir. GetNextPlaylistTrack and then -- that's
15 the name of the function. And if you scroll down a
16 little bit, I'd like to see what's from here (indicating)
17 down.

18 Q. Okay. Just for the record, your
19 GetNextPlaylistTrack is at which line?

20 A. At line 1112.

21 Q. And that's on Plaintiff's Exhibit 713, page 235?

22 A. Yes.

23 Q. All right. So, we need to go down a little bit?

24 A. That's correct.

25 And what this code starts to demonstrate is

1 where you can increment the track index. So, the track
2 index -- they changed the name of the variable from
3 "index" to "track index," but it points to the same
4 information.

5 And now what you're doing is you're using a
6 convention that's part of the code that has "++."
7 "++" is shorthand in this computer code for adding one to
8 that index value. And there's a couple of different
9 situations that it will check here. For example, if you
10 have "repeat" off, what will happen. If you have repeat
11 one track, that's an option that you can select, or
12 repeat all tracks.

13 And what this source code will go through and
14 do is increment that value of trackIndex. And then you
15 would go back to PlayerNext, and then you would go
16 through the PlayerPlay to play the song at this new
17 trackIndex.

18 Q. All right, Dr. Almeroth. Can you now explain how
19 the algorithms you just walked through in the iPod source
20 code relate to the three steps shown for element 1F in
21 the '076 patent?

22 A. The source code that I've shown, starting with
23 PlayerNext and walking through some of those other
24 algorithms, performs the equivalent steps that are
25 described on this board, Plaintiff's Exhibit 1040, that

1 represents the court's claim construction with respect to
2 element 1F.

3 Q. Did you summarize the code that you just explained
4 in Exhibit 771A under element 1F?

5 A. Yes, I did.

6 Q. All right, Dr. Almeroth. With respect to
7 element 1F after analyzing the source code, what is your
8 conclusion about whether the iPod classic 3 meets
9 limitation 1F of the '076 patent?

10 A. It meets the limitation 1F.

11 Q. Can we check that off?

12 A. Yes, sir.

13 Q. Dr. Almeroth, have we now gone through your
14 opinion whether all of the elements of the '076 claim 1
15 are met by the classic 3?

16 A. Yes, sir, we have.

17 Q. And after looking at all of the material that you
18 looked at, including Apple's technical documents,
19 considering the testimony, reviewing the source code, did
20 you reach a conclusion about whether the iPod classic 3
21 infringes claim 1 of the '076 patent?

22 A. I did.

23 Q. What's your conclusion?

24 A. My conclusion is that claim 1 of the '076 patent
25 is infringed by the classic 3.

1 Q. There's a couple questions the law encourages me
2 to ask you now. Did you follow the court's claim
3 construction for each element when you did your analysis?

4 A. Yes, I did.

5 Q. For the means element, all of the means elements,
6 did you find that the iPod classic 3 performs the
7 identical functions to the ones in the claims?

8 A. Yes, I did.

9 Q. And for the means elements, did you find that the
10 iPod classic 3 has identical or equivalent structure to
11 the structure set forth in the court's claim
12 constructions viewed from the view of a person of skill
13 in the art in 2001?

14 A. Yes, sir, I did.

15 Q. All right. Dr. Almeroth, I'd like to switch to
16 something completely different for a few minutes. Do you
17 have a classic 3 there that you can just demonstrate what
18 happens on the classic 3 when you do some of these
19 algorithms?

20 A. Yes, I do.

21 Q. And, Dr. Almeroth, is there a camera there that
22 you can use to project that demonstration onto the screen
23 here?

24 A. There is.

25 Q. All right. Now, we just set this up to see if we

1 could get a little better view of the iPod; so, we'll
2 hope that it shows clearly.

3 A. I'm also going to hook up some speakers.

4 Q. All right. What is it that you are showing on the
5 big screen right now?

6 A. What I'm showing on the big screen is a classic
7 Generation 3.

8 Q. And can you just tell us what exhibit number that
9 is?

10 A. This is Exhibit 187.

11 Q. And that's a plaintiff's exhibit?

12 A. Plaintiff's exhibit.

13 Q. All right. So, what do we see when we look at the
14 front of this thing?

15 A. Not a whole lot. It's a little washed out. Let
16 me see if I can -- oh, wow. That works.

17 What you can see is a number of buttons at the
18 top; and it's a "back" button, a "menu" button, a "play"
19 button, and a "skip forward" button. In fact, let me
20 turn them on and there will be some color to it.

21 And then you see this wheel at the bottom, and
22 it has a "select" button in the middle of that device.

23 Q. That's the circle, little circle in the middle of
24 the great big circle on the bottom half of this thing?

25 A. Yes, sir. That's the "select" button.

1 Q. And what just happened on the screen?

2 A. When I pressed the "play/pause" button, the device
3 came on. And what you see is that this is an iPod.
4 That's what's described here at the top (indicating).
5 And then you have a number of menus. There's a music
6 menu, a playlists menu, an extras, a segments, and a
7 backlight menu.

8 Q. All right. Dr. Almeroth, can you now demonstrate
9 how you go to a playlist on this iPod?

10 A. Sure. You use the Clickwheel to go to playlists
11 and then press the middle button to select it.

12 And now what you see is three menu items, "PA
13 Playlist 1," "PA Playlist 2," and then an "On-The-Go"
14 selection.

15 Q. What are those PA playlists?

16 A. The "PA" stands for "Personal Audio." Those are
17 playlists that I prepared and loaded onto this device.

18 Q. And how did you get them on there?

19 A. I used an *iTunes* computer to create the playlists
20 and put them on the device.

21 Q. And what kind of connection did you use?

22 A. I used a USB connection.

23 Q. All right. Did you observe what happened when you
24 plugged the USB plug into the player?

25 A. Yes, I did.

1 Q. What happened?

2 MR. STEPHENS: Objection, your Honor. Again
3 he's talking about a product that's not accused.

4 THE COURT: All right. And by that you mean
5 the computer loaded with the *iTunes* program?

6 MR. STEPHENS: That's correct.

7 THE COURT: Okay. And for the same reasons,
8 I'll overrule that.

9 MR. STEPHENS: Thank you.

10 BY MR. HOLDREITH:

11 Q. And, Dr. Almeroth, my question is specific to the
12 iPod.

13 A. Yes, sir.

14 Q. What did you observe happening when you plugged
15 the iPod in?

16 A. When I plugged the cable into the bottom of the
17 iPod, it caused a synchronization with the *iTunes*
18 computer; and then this device received the playlists and
19 songs that were --

20 THE COURT: Wait, wait, wait. I want to hear
21 what you saw. I mean, unless you can tell me you saw the
22 synchronization inside the computer, that's --

23 THE WITNESS: I was --

24 THE COURT: Let's be very clear what you saw.

25 THE WITNESS: Okay.

1 BY MR. HOLDREITH:

2 Q. Dr. Almeroth, let's stick to what you could
3 observe externally. We'll get to what you know about
4 what happens inside later.

5 A. Okay. What I saw was on the *iTunes* computer that
6 application start up and cause a synchronization to take
7 place.

8 Q. And what do you mean by "synchronization"?

9 A. The synchronization process is the process of
10 downloading songs and playlists onto the iPod.

11 Q. Were those two playlists, PA Playlist 1 and PA
12 Playlist 2, were they on there before you plugged it in?

13 A. No, they were not.

14 Q. And after you plugged it in, did they show up?

15 A. Yes, they did.

16 Q. Okay. Why don't you go ahead and demonstrate how
17 to play a playlist using the continuous play mode.

18 A. Certainly. One of the things that I can do is
19 just press the "play" button and it will start playing
20 the first song of the playlist.

21 Q. How do you know this is the first song in the
22 playlist?

23 A. Because up here in the corner (indicating) it says
24 "1 of 4." That's the first song of the four on the
25 playlist.

1 Q. All right. And we can't quite hear it here, but
2 that's okay. Can you hear it coming out of the speakers
3 there?

4 A. Not yet. I haven't turned up the volume.

5 Q. Okay. Now, can you demonstrate for us -- looks
6 like this song is some four or five minutes long?

7 A. Yes.

8 Q. Is there a way to speed up the process of seeing
9 what happens when this song ends?

10 A. Yes. I can -- now there are about ten seconds
11 left in the song; and what we'll see is when the song
12 ends, it will go to the next song.

13 Q. What just happened?

14 A. That song ended. Song 1 of 4 ended, and then Song
15 2 of 4 started.

16 Q. And did you touch any buttons or do anything to
17 make Song 2 start playing after Song 1 ended?

18 A. I did not.

19 Q. All right. Can you now -- have you observed
20 whether the iPod will continue to do that through the
21 playlist as each song ends?

22 A. Yes, I have. This song is a long song. It's
23 eight minutes and -- almost nine minutes. I don't think
24 we want to wait that long. But if we go to the end of
25 this song, it would automatically go to 3 of 4 on this

1 playlist.

2 Q. All right. Now, Dr. Almeroth, could you
3 demonstrate what happens when you push the "skip forward"
4 button, please?

5 A. Certainly. This is the button on the right
6 (indicating), skip forward. Now we just went to Song 3
7 of 4.

8 Q. And how can you tell that that's 3 of 4?

9 A. In the upper left-hand corner, the number changed
10 from "2 of 4" to now it says "3 of 4."

11 Q. All right. And can you demonstrate one more
12 time -- so we know what to expect this time -- what
13 happens when you press the "skip" button forward?

14 A. Now it's gone to the last song, a Frank Sinatra
15 song; and it shows "4 of 4." And I have the volume on
16 the speaker set so that I think a couple people can hear
17 but not so that it overwhelms your questions.

18 Q. All right. Now, we haven't gotten to this yet;
19 but will we be talking about the "skip backward" button
20 later?

21 A. Yes, we will.

22 Q. Can you demonstrate for us what happens when you
23 press the "skip backward" button? And first tell us
24 what's going to happen, and then show us.

25 A. Certainly. If I press the "skip back" button now,

1 it will go back to the beginning of the song. It's 35
2 seconds into the song. So, if I press "skip back," it
3 will just go back to the beginning of the song
4 (demonstrating).

5 Q. How can you tell it went back to the beginning of
6 the song?

7 A. A couple of ways. It's still Song 4 of 4. It's
8 still the Frank Sinatra song. And this number here
9 (indicating) that indicates how much time has elapsed
10 went from about 35 seconds back to zero. And I can
11 demonstrate it again. It's now on about 18 seconds.
12 We'll turn it up a little bit. (Demonstrating).

13 So, now we're about 25 seconds in. If I press
14 the "back" button, the same song back to the beginning.

15 Q. Is zero the beginning of the song?

16 A. Yes.

17 Q. All right. Now, Dr. Almeroth, does something
18 different happen when you hit that same "back" button if
19 you do it at a different time interval?

20 A. Yes. Less than three seconds into the song, if I
21 press the "back" button, it will go from the fourth song
22 to the third song. It uses a three-second threshold. If
23 more than three seconds has elapsed, it goes to the
24 beginning of the song. If less than three seconds has
25 elapsed, it goes to the beginning of the previous song in

1 the playlist.

2 Q. Can you show us that?

3 A. Sure.

4 Q. Tell us what you're going to do and then show us.

5 A. I'm going to hit the "back" button twice. Once to
6 send it back to the beginning of the song. It will be
7 less than three seconds, and then I'll hit the "back"
8 button again. So, back once, back twice (demonstrating).
9 And now we're to the third song on the list, Song 3 of 4;
10 and this is Bruce Springsteen.

11 Q. Okay. Finally -- we haven't talked about this yet
12 either, but we'll get to it. Is there a way that you can
13 look at this playlist, pick any song you want, and go to
14 that song?

15 A. Yes, sir.

16 Q. Can you show that, please?

17 A. If we go back to the menu and we can select "PA
18 Playlist 1," it shows that there are four songs on this
19 playlist and Number 3 is the one that's currently
20 playing. It has a little speaker icon with sound coming
21 out of it (indicating).

22 And we can use the wheel to move down on any
23 one of these songs, and we can select it. So, for
24 example, I'll select the song "Pinch Me" and then press
25 the "select" button, the circle inside the larger circle;

1 and it will go and play the first song on the list.

2 Q. Now, Dr. Almeroth, now that you've selected the
3 first song, could you also have gone to the second song
4 or the third song or any one you wanted to?

5 A. Yes, that's correct.

6 Q. Now that we're on the first song, what happens if
7 you push the "back" button two songs when you're on the
8 very first song in the playlist?

9 A. If I press the "back" button twice, because I'm in
10 repeat mode -- and there's a little icon that represents
11 that I'm in repeat mode -- I'll go back to the beginning
12 of the fourth song. I'll go from the first song back to
13 the fourth song. (Demonstrating).

14 So, this is back to the first Sinatra song.

15 Q. So, when you skip backwards from the beginning in
16 repeat mode, where do you go?

17 A. To the last song on the playlist.

18 Q. Okay. And how about if you skip forwards from the
19 last song? So, we're at Song 4 of 4. What's going to
20 happen if you skip forward to the next song now?

21 A. If I press the "skip" button now, you wrap back
22 around and go to the first song on the playlist.
23 (Demonstrating). And that's the "Pinch Me" song again,
24 and it says Song "1 of 4."

25 Q. Is there anything else you wanted to demonstrate

1 right now with that?

2 A. Those are the functions that I wanted to
3 demonstrate.

4 Q. Okay. Dr. Almeroth, did you also perform that
5 same kind of analysis with respect to other versions of
6 the iPod that are laid out there in front of you?

7 A. Yes, I did.

8 Q. And that included members of the mini family?

9 A. Yes.

10 Q. Did it include members of the nano family?

11 A. It did as well.

12 Q. Do they behave in a similar way?

13 A. Yes, they do.

14 Q. Dr. Almeroth, I wanted to ask you just quickly
15 about that repeat. Can you turn the repeat mode off if
16 you want to so it doesn't loop around?

17 A. Yes, I can.

18 Q. What happens if you press -- if you're at the end
19 of the playlist, Song 4 of 4, and you're not on repeat
20 mode and you skip -- try to skip forward?

21 A. The playlist will stop. And I can demonstrate
22 that if you'd like.

23 Q. Okay.

24 A. (Demonstrating). We'll go back to the menu, to
25 the menu, to the menu. And now we'll go down to

1 "settings," select on "settings," go down to "repeat,"
2 currently set to "all." And I will change it to "off."

3 Go back to the menu, go back up to playlist,
4 press "select." Go to "PA Playlist 1" and press
5 "select." And then we'll go ahead and play the first
6 song; and then we'll skip to the second, skip to the
7 third, skip to the fourth.

8 Okay. So, now we're on the last song of the
9 playlist. And if we press the "skip" button again, we'll
10 go back to the top level menu. That playlist will have
11 completed and playout will stop.

12 Q. All right. Now, Dr. Almeroth, I was just curious.
13 You had a second playlist on there, PA 2?

14 A. Yes.

15 Q. What's that?

16 A. It's a second playlist. What's interesting about
17 this playlist, just to show you, now you have four songs
18 but the first three songs are the same and the last one
19 is different. It shows you the kind of flexibility where
20 you can have similar playlists even though this iPod only
21 has five songs stored on it. You have the first three
22 that are common to the two playlists and then a fourth
23 one that's the fourth song on the first playlist and then
24 the fifth song is the fourth song on the second playlist,
25 if you can follow that.

1 Q. All right. But the point is that you can take the
2 same five songs and arrange them different ways with
3 different playlists?

4 A. Yes. That's correct.

5 Q. All right. Why don't you go ahead and put that
6 demonstration away, and we'll continue.

7 All right. Dr. Almeroth, in addition to
8 analyzing the classic 3 the way you just demonstrated,
9 element by element for claim 1 of the '076 patent, did
10 you also do that same kind of analysis, line by line and
11 document by document, for the other 13 iPods -- or other
12 12, I should say?

13 A. Yes, the other 12. I did.

14 Q. And did you look at source code from the other 12
15 iPods?

16 A. Yes, I did.

17 Q. Did you do that same kind of analysis you just
18 showed us for those other 12 iPods with respect to the
19 source code?

20 A. I did.

21 Q. I show you again Plaintiff's Exhibit 1058 and --
22 which you showed on Friday. Just remind us. What does
23 this chart show?

24 A. This chart shows eight groupings of devices, and
25 they range from classic 3 to nano 5. Groups 2 and 6 have

1 multiple members to the group. And then below each of
2 the groupings there is a version number, and that
3 represents the latest version of the source code that
4 runs on those devices.

5 Q. All right. Which of these groups -- just to
6 orient us -- is the one that we just went through?

7 A. That was Group 1. That was the classic 3.

8 Q. All right. Now, for all of the other seven
9 groups, 2 through 8, did you have a similar set of
10 documents that you were able to reference that described
11 the technical features of the members of those groups?

12 A. Yes, I did.

13 Q. And referring back to Plaintiff's Exhibit 748A,
14 does that chart list the set of documents for each group?

15 A. Yes, it does.

16 Q. I'm showing page 4 now. At the top of page 4,
17 there is a title. Can you explain that title, please?
18 And I'll blow it up.

19 A. This title is for the second group. This is the
20 group with the three devices. It had the classic 4 and
21 then the mini Generations 1 and 2.

22 Now, in that grouping, the mini 2 was selected
23 as the representative device. I could have performed an
24 analysis on the mini Generation 2 and the conclusions
25 that I drew about that device with regard to infringement

1 would also apply to the classic Generation 4 and the mini
2 Generation 1.

3 Q. And who decided that it would be that way?

4 A. The groupings were done by Apple.

5 Q. And who decided that the mini 2 was the
6 representative device?

7 A. That was Apple.

8 Q. Okay. I see here under the documents you've
9 listed for that Group 2, there is a listing of classic
10 Generation 4, which looks like it's a member of the
11 group. Why is that?

12 A. I did a separate analysis just to make sure that I
13 analyzed all of the devices separately. So, even though
14 I had the representative Group 2, I also had documents
15 with respect to the classic 4; and then on the next page
16 is also the mini 1. So, I made sure to look at all of
17 the documents just to make sure that they were consistent
18 and that my opinions with regard to infringement applied
19 to all of the members of the group.

20 Q. Okay. So, which group or groups does page 4 of
21 your index, Exhibit 748A for plaintiffs -- which group
22 does that relate to?

23 A. It relates to Group 2.

24 Q. All of this page?

25 A. Yes, sir. And then all of the next page as well.

1 Q. And when you said "all of the next page as well,"
2 is that mini 1 as another member of that group?

3 A. Yes, it is.

4 Q. Okay. And then for page 6, classic Generation 5,
5 is that one of the groups that you studied?

6 A. It is.

7 Q. And does page 6 of Plaintiff's Exhibit 748A list
8 the documents that describe technical features of the
9 classic Generation 5?

10 A. Yes, it does.

11 Q. Okay. Let's remember. It's classic Generation 5.
12 Which group is that?

13 A. That's Group 3.

14 Q. Now, just to make a record -- and let's try to do
15 this quickly -- returning to page 7 of Plaintiff's
16 Exhibit 748A, is this a listing of documents you relied
17 on that provide a technical description for the nano
18 Generation 1?

19 A. Yes.

20 Q. And is that Group 4?

21 A. 4, yes, sir.

22 Q. Similarly, page 8, is that -- of 748A for
23 plaintiffs, does that provide a list of technical
24 documents that describe the nano Generation 2 that you
25 relied on?

1 A. Yes.

2 Q. And nano Generation 2 is group --

3 A. 5.

4 Q. Okay. Pages 9 and 10 of Plaintiff's Exhibit 748A
5 relate to which group?

6 A. That is Group 6; and it includes the two items,
7 the nano Generation 3 and it also includes the classic
8 Generation 6.

9 Q. Page 11 of Exhibit 748A, which group is this?

10 A. This is nano Generation 4, and that's the one item
11 in the seventh group.

12 Q. Finally, page 12 of Exhibit 748A for plaintiffs,
13 what's shown here?

14 A. This is the nano Generation 5, and this is the
15 eighth group.

16 Q. All right. Now, Dr. Almeroth, when you explained
17 the documents you relied on for the classic Generation 3
18 here at page 3 of Plaintiff's Exhibit 748A, did you do
19 anything to create a summary of the portions of those
20 documents that you relied on to find the elements of the
21 '076 patent?

22 A. Yes, I did.

23 Q. And how did you go about doing that?

24 A. What I looked at was -- for each of the groups,
25 what I tried to do was understand where there were common

1 features that related to the limitations of, for example,
2 the '076 patent and I prepared a chart where for the
3 columns I would identify each of the groups and then for
4 rows I would identify features and characteristics of the
5 devices as they related to the limitations of the claims
6 of the '076 patent.

7 Q. Could you look now -- I'm not going to put it on
8 the screen; but could you look at Exhibit 771, please?
9 That's in the little skinny extra book where we looked at
10 771A earlier.

11 A. Yes, sir.

12 Q. Looking at 771A, is that a document that you had
13 prepared?

14 A. Yes, sir, it is.

15 Q. And does 771 for plaintiffs show quotations from
16 the technical documents that you reviewed that are listed
17 on Plaintiff's Exhibit 748A?

18 A. It does.

19 Q. Is there anything in that document other than
20 quotations from the technical documents you relied on and
21 quotations from the patent?

22 A. It does not.

23 Q. And is Exhibit 771 a summary of the technical
24 documents you reviewed along with Apple's interrogatory
25 answers and the information in those documents that you

1 found helpful to determining whether the claim
2 limitations of the '076 patent were met?

3 A. Yes. That's what this document contains.

4 MR. HOLDREITH: Your Honor, I offer
5 Plaintiff's Exhibit 771 as a summary, under Rule 1006, of
6 voluminous documents.

7 MR. STEPHENS: Objection, your Honor.

8 THE COURT: Is it 771 or 771A?

9 MR. HOLDREITH: Your Honor, I had offered 771A
10 previously, which was source code. This is 771, which is
11 a summary of the technical documents that we went through
12 at the beginning of the analysis.

13 THE COURT: Okay. Ladies and gentlemen, it is
14 5:00, which comes at a handy time. So, we're going to
15 break for the evening. We'll start again tomorrow
16 morning on the schedule we've been on before. We'll
17 start at 8:30 and your lunch will be brought in at noon
18 as before and we'll break sometime probably right at 5:00
19 or shortly thereafter.

20 Again, please remember my instructions. Don't
21 discuss the case with anybody. Definitely do not let
22 anybody discuss the case with you in any way, shape, or
23 form. If somebody should try to do that -- and, of
24 course, I'm not talking about, as I said before, someone
25 saying, "What were you doing today?" But if someone is

1 trying to find out what happened or talk to you about it,
2 get their name and report it to the court security
3 officer. And, again, please don't try to do any outside
4 research. I'll see you tomorrow at 8:30.

5 (The jury exits the courtroom, 5:01 p.m.)

6 THE COURT: You can step down, sir.

7 THE WITNESS: Thank you, sir.

8 THE COURT: All right. Let me understand,
9 because 771A wasn't admitted. I said I would allow him
10 to talk about it because it was covering a lot of claims
11 that we haven't reached and then I would decide on 771A.

12 But now you're wanting to bring in 771 as a
13 summary under 1006?

14 MR. HOLDREITH: Yes, sir.

15 THE COURT: And this is basically I think the
16 one that I had ruled on before, and I think I had
17 sustained the objection pointing specifically to the
18 deposition extracts, right?

19 MR. HOLDREITH: That's right, your Honor; and
20 this is the same document with the deposition extracts
21 removed.

22 THE COURT: Okay. Mr. Stephens, state your
23 objection.

24 MR. STEPHENS: Sure. This is not a proper
25 summary of evidence under Rule 1006. It's really their

1 infringement contentions. It's essentially the same
2 thing as what was attached to Dr. Almeroth's report with
3 the deposition portions taken out.

4 If this is a summary of evidence, your Honor,
5 1006 has no real meaning because you can put any evidence
6 you want into a document and then move it into evidence
7 under 1006. This is a compilation of a lot of things
8 that Dr. Almeroth did not testify about and some things
9 that he did put together into a claim chart to support
10 their allegations of infringement. It's just their
11 infringement contentions.

12 THE COURT: Okay. Point to me the items about
13 which he did not talk about, about which he did not
14 speak.

15 MR. STEPHENS: So, for example -- well, your
16 Honor, it's kind of hard with 130 pages of material here
17 to go through; but I believe --

18 THE COURT: Well, let me -- counsel -- and
19 this is to both sides. The rules on summaries are
20 somewhat restrictive. Now, the Fifth Circuit cases give
21 me some leeway. And, for example, many courts will allow
22 an attorney to go through with a witness, say, a
23 timeline, on April 1 you did thus-and-so and April 2 you
24 did thus-and-so, and I've even seen it where the next
25 witness comes in and more points are put in and at the

1 end you have a timeline and that can be allowed, without
2 reversible error, in as an exhibit basically constructed
3 almost on the spot as a timeline.

4 Now, technically it's not a summary of
5 underlying documents; and there are cases, especially
6 financial document kinds of cases, where summaries will
7 be put together. I'm concerned -- well, in patent cases
8 I think some leeway has to be given to attorneys in an
9 attempt to provide something to juries because --
10 especially a case like this. I mean, this isn't a nuts
11 and bolts or a little piece on a motorcycle case or a
12 tractor. This is much more complicated.

13 So, on one hand I am inclined to allow some
14 leeway in allowing development of the evidence. And you
15 take a look at the rules of evidence and how they're to
16 be interpreted. But on the other hand, to put into a
17 summary things that were not discussed --

18 MR. STEPHENS: And I can give you specific --

19 THE COURT: -- is not appropriate and then
20 also things that are not -- for example, the pictures
21 of -- I mean, if, for example, the page -- on page 1 --
22 in other words, it has a page that shows the iPod and it
23 says, "iPod Classic Third Generation User Guide, page" --
24 and it gives a page number. If that is, in fact, a page
25 of the user guide, that would seem to me to be the kind

1 of thing you might be able to include in a summary.

2 But then if we take a look at pages 2 and 3, 2
3 says it's from the specification; but I can't tell if
4 that's a picture with something -- or if that's what's
5 actually on that specification page.

6 And then on page 3 of the exhibit, those seem
7 to just be a couple of pictures.

8 So, those aren't really summaries of
9 underlying documents. That's just a couple of
10 photographs which you could have in -- you don't really
11 need that in a summary.

12 So, that, in effect, in my mind covers some of
13 the problems -- you know, some would appear to be within
14 the kind of leeway I would see possible in this kind of
15 case.

16 Now, pages that simply weren't discussed,
17 that's a little much because -- it's what I've discussed
18 before. To just simply dump on the jury, let's say, a
19 book of source code wouldn't do them much good.

20 So, what I'd like is for counsel to
21 discuss and let's see if we can get together on or if you
22 can get together on what pages flat weren't discussed.

23 Do you have an example?

24 MR. STEPHENS: I have several examples, your
25 Honor.

1 THE COURT: All right. Give me the first one.

2 MR. STEPHENS: Okay.

3 THE COURT: Page --

4 MR. STEPHENS: Well, there's one on page 4.

5 THE COURT: Okay. Page 4.

6 MR. STEPHENS: Element 1A, there is a
7 discussion of audio file formats supported by the iPod.
8 There is no discussion of that --

9 THE COURT: Okay. Well, this chart, is this a
10 page from -- what is it?

11 MR. STEPHENS: Your Honor, I was referring to
12 the chart.

13 MR. HOLDREITH: What it is, it's an excerpt
14 from the third generation user guide that was -- the user
15 guide was discussed by Dr. Almeroth. We haven't gotten
16 to this page yet. We will. And this is just a quotation
17 straight out of that user guide --

18 THE COURT: Okay. You say this is a
19 quotation. Because you've shown some exhibits that look
20 very similar to this. So, you're saying that what's in
21 that large box to the right of 1A and to the right of the
22 claim under the heading "infringement evidence" on page
23 4, that's just simply a copy of what's in the user
24 guide --

25 MR. HOLDREITH: Yes, sir.

1 THE COURT: -- as referenced?

2 MR. HOLDREITH: Yes, sir.

3 THE COURT: Okay. All right. So, that's a
4 user guide reference; and here we have that.

5 Okay. Now, Mr. Stephens, why shouldn't they
6 be allowed to use -- are you saying that whole page just
7 simply wasn't discussed?

8 MR. STEPHENS: Well, what I'm saying is that
9 they've put in lots of pieces of evidence that there has
10 been no discussion about. That's one example.

11 Another good example is on page 60 where they
12 talk about whole software packages that are not
13 discussed --

14 THE COURT: Okay. Well, let me -- let's get
15 to it.

16 MR. STEPHENS: It's one thing for him to
17 testify about a document and another thing to say that he
18 could just go through very large documents and pull out
19 pieces here and there and put them all into a 130-page
20 document.

21 One other point I'd like to make, too, your
22 Honor, these summaries fill an entire bankers box. I
23 don't know what a jury is going to do with that. We're
24 talking about maybe a thousand pages. This is not a
25 summary that's going to be usable in any meaningful way

1 by the jury. This is about protecting the record by
2 moving into evidence things there has been no testimony
3 about.

4 MR. HOLDREITH: Your Honor, if I may be heard,
5 I have a comment on that.

6 THE COURT: Well, for example -- and maybe
7 it's -- well, it would seem that any particular page of
8 an Apple document could come in. I mean, if you've got,
9 say, an Apple user manual for the iPod classic, I mean,
10 what kind of objection could you have if a witness was to
11 bring that in and introduce that as this is page 52 of
12 the iPod manual?

13 I suppose you could introduce some other pages
14 if you thought that wasn't complete but --

15 MR. STEPHENS: Let me explain.

16 THE COURT: -- could you argue that he could
17 not get in, say, page 52 of the user manual?

18 MR. STEPHENS: That's not the issue.

19 THE COURT: Okay.

20 MR. STEPHENS: He could certainly get in page
21 52.

22 THE COURT: All right.

23 MR. STEPHENS: What he could not get in is his
24 unexpressed opinion that that particular page maps onto
25 element 1E, for example. I'm making that up, of course.

1 And that's what this is for. It's not to get in that
2 page of the document. Those are already in evidence, or
3 they certainly could be admitted. We have no objection
4 to that at all.

5 THE COURT: Okay. So, your concern, then, is
6 really more the use of the summary when he hasn't stated
7 the opinions on that.

8 MR. STEPHENS: Exactly. The use of things he
9 has not testified as actually supporting his opinion to
10 bolster his opinion through a very voluminous collection
11 of documents, thousands of pages, that are clearly
12 intended just for purposes of appeal, without any actual
13 testimony in the courtroom on --

14 THE COURT: Well, let's be fair. Most of what
15 you're going to put in is for purposes of appeal, too. I
16 mean, in this kind of a case, learned counsel -- I mean,
17 skilled counsel on both sides are keeping a close eye on
18 that. I assume you've probably got appellate lawyers on
19 both sides. So, let's not throw stones on the fact that
20 it's for appeal.

21 The concern I have -- and this is directed to
22 Personal Audio -- is almost exactly what Mr. Stephens is
23 saying. The Fifth Circuit cases say I can allow in a
24 summary and I think actually in a case like this
25 summaries and even almost demonstratives could be

1 admissible with the proper instruction -- and this is
2 what the cases also say -- that, you know, "Ladies and
3 gentlemen, this is not in and of itself evidence. This
4 is what the witness says are the pieces of evidence that
5 apply. You, of course, will have to examine the
6 underlying pieces of evidence and you must determine" --
7 I mean, it's -- the instruction is along that line as
8 indicated by the cases. And they also -- those cases
9 teach that I need to be very careful about that.

10 Now, the ones that he went through on claim 1,
11 I think that I would allow a chart with those pages that
12 he actually talked about up against the claims as, in
13 effect, a summary or demonstrative that they could have
14 with them to aid them in their deliberations so that when
15 they're saying, "All right. What was said about 1A,"
16 they would know what to look at and they could look at
17 the piece of evidence that it refers to.

18 I can see counsel making an objection to that,
19 but I think it's going to be hard enough for the jury to
20 figure out what's going on. And, so, I think if the
21 experts wanted to do that to kind of give them a map,
22 here is the claim piece or here is the invalidity
23 contention and here is the piece of evidence you should
24 go look at, with the proper instruction from me,
25 something like that might be -- I might consider doing

1 that.

2 But right now I think Mr. Stephens is correct
3 that a lot of this he has not discussed in connection
4 with anything. I mean, some of these are similar; and I
5 guess the analysis that he went through on claim 1 with
6 the classic is probably similar to what he's going to do
7 with the same claims on the other versions of the iPod.
8 But then what are you left with on appeal with -- you've
9 got your evidence in the record and then you've got what
10 I'm going to allow in with a summary and technically
11 that's not going to be evidence. That's going to be kind
12 of a road map to evidence that needs to be introduced.

13 MR. HOLDREITH: Yeah. So, your Honor, our
14 intention is precisely to first help the jury get through
15 this very large volume of evidence which I think is
16 exactly what Rule 1006 is for; and we certainly are
17 trying to find an efficient way for the court and for the
18 jury to get through a huge volume of documents.

19 The documents which are quoted in this chart
20 are all on the admitted list without objection.

21 THE COURT: Admissible.

22 MR. HOLDREITH: Admissible. Excuse me.
23 Admissible list without objection.

24 So, there is no objection to the underlying
25 evidence. We're walking through it as much as we can and

1 we'll be going through more of it and Dr. Almeroth will
2 be providing opinions. For example, he says, "Look,
3 there is a user guide for each one of these 13 devices
4 and it has similar information to what I've presented to
5 you here." We do have a chart like this, just to tell
6 the court where we're going. You know, there is a 772
7 and '73 and all of the way up to, I believe, '91 maybe.
8 So, I think we have -- I think we have 13 of these
9 things, 12 or 13.

10 THE COURT: Yeah, but you've asked me to admit
11 this chart before you even -- I mean, you're already up
12 to claim 14; and it hasn't even been discussed. All
13 you've talked about so far is claim 1.

14 MR. HOLDREITH: Certainly happy to go through
15 all of the claims first. We are going to do that. I
16 won't do it quite this way. We'll point out differences
17 and be a lot more efficient. And after I have the
18 witness talk about the evidence for all those other
19 claims, reoffer this exhibit.

20 But it is simply excerpts of admissible
21 evidence.

22 THE COURT: Okay. Then when you have gone
23 through the evidence that you say is -- I'm going to
24 sustain the objection for now. When you have gone
25 through all of that evidence that you say is in there, go

1 ahead and offer it again. I'll allow Mr. Stephens to
2 object. And what I'm going to want is very -- I mean, if
3 it's a page from an Apple manual, user guide, whatever
4 that's on the admissible list and the witness has talked
5 about it, then that's one thing. If it's things that
6 aren't there at all, that's another. And I'm going to --
7 and I've got in my mind what the instruction would be.
8 I've used it in the past, and I'll just have to -- but
9 it's basically going to be an instruction to the jury
10 that they're going to look at this basically for purposes
11 of a -- basically a summary but not as evidence and
12 telling them that they need to look at the underlying
13 evidence and documents. This is just barely where it --
14 I mean, that's a -- like I say, that kind of instruction
15 I'm going to draft out so I can read it very clearly to
16 them.

17 I will consider that at that time if you've
18 gone through all of this, but I think Mr. Stephens is
19 correct at this point. To just let this in and all these
20 things come in -- I think you would be cutting your own
21 throat actually because the higher court would look at
22 that and say, "No, that's just too much. The trial court
23 gets some discretion, not that much." Okay?

24 And then, of course, when they get to that
25 point, you'll be in a position then to see what

1 they've -- how they have set this up. And you may be
2 considering this for your expert also.

3 It is confusing, and we all know that. You
4 have a claim. You have a bunch of elements. How do you
5 put it to a jury so that when they're looking at, say,
6 claim element 1A, what are the pieces of evidence you
7 want them to look at and what are the pieces of evidence
8 you want them to look at, either for infringement or
9 invalidity.

10 I can see this as a legitimate way under the
11 rules to be done, as long as the jury is clearly
12 instructed. Now, I don't think these charts or summaries
13 should have somebody else's interpretation of what the
14 manual says. If this is an actual copy of a page or half
15 a page from the manual, that's one thing. But to have an
16 expert say, "Well, on page" -- or "In such-and-such a
17 manual, they admitted" -- that's not proper either.

18 And then just to have -- I'm not sure what the
19 benefit is of having the photographs, unless it was a
20 photograph contained in the manual.

21 MR. HOLDREITH: There are three kinds of
22 photographs in there. I can explain if the court would
23 like.

24 THE COURT: Okay. Well, I'm just telling you.
25 Just a flat photograph of like this one on page 3 on the

1 top, that looks like something that probably you or the
2 doctor took on a table.

3 MR. HOLDREITH: It's one of the physical
4 exhibits --

5 THE COURT: Sure.

6 MR. HOLDREITH: -- that he's talked about.

7 THE COURT: Well, that doesn't need to be in
8 the summary. I mean, you can argue and hold those up to
9 the jury and so forth.

10 Now, the diagram that was in somebody's
11 manual, that's a little different. If that was actually
12 a page out of the manual, fine.

13 MR. HOLDREITH: It is.

14 THE COURT: Okay. But I think you need to go
15 through this with some care, just -- well, like here
16 there is a -- it looks like pages 3 and 4 are almost
17 exactly -- they are the same. It's kind of duplicative
18 when they're just photographs.

19 So, I'm going to sustain the objection at this
20 time. I'm not saying at the end you won't be able to get
21 in some kind of a demonstrative that the jury will be
22 able to use as an aid to looking at the evidence, but
23 they're going to be instructed that that in and of
24 itself -- his summary or his opinion is not the evidence.
25 They've got to remember what he testified and then look

1 at the piece of evidence.

2 MR. HOLDREITH: I think an instruction is
3 entirely appropriate, your Honor.

4 MR. STEPHENS: Thank you, your Honor.

5 THE COURT: Okay. All right. Anything else
6 that needs to be taken up outside the presence of the
7 jury at this time?

8 MR. CORDELL: Your Honor, I do have a
9 housekeeping issue.

10 THE COURT: All right.

11 MR. CORDELL: We have a witness that we were
12 going to call a little later and we just hoped we were a
13 little further along by this time and he's working for a
14 different company now and he's got commitments on
15 Wednesday morning back in California. We were hoping to
16 take him out of order tomorrow at some point. And we'll
17 leave to the plaintiff when they would like to hear from
18 him.

19 THE COURT: Who is it?

20 MR. CORDELL: It's Tony Fadell. It's someone
21 they had on their list and they want to talk to as well.

22 THE COURT: About how long do you think you're
23 going to have him on?

24 MR. CORDELL: I think it's maybe 45 minutes or
25 so. Is that --

1 MR. STEPHENS: Maybe an hour.

2 MR. CORDELL: Maybe an hour, 45 minutes to an
3 hour.

4 THE COURT: All right. And let me hear from
5 Personal Audio.

6 MR. SCHUTZ: Your Honor, Mr. Fadell is one of
7 the witnesses whose documents were produced late. We had
8 an additional deposition that the court ordered on him,
9 just for the context of who Mr. Fadell is.

10 He's under contract to Apple at \$10,000 a
11 month. I understand he's got some scheduling thing. We
12 would object to him being inserted into our case. I'm
13 not sure what steps they've taken to see if he can stay
14 over.

15 If he is inserted into our case, we'd like to
16 call him then adverse so that I can cross-examine him
17 first. I think it's unfair for them just to start their
18 case with their first witness on direct in the middle of
19 our case.

20 THE COURT: And you had him on your witness
21 list anyway?

22 MR. SCHUTZ: I think -- I'm not sure we had
23 him on our witness list.

24 Yeah. I mean, one of the agreements we had
25 come to, your Honor, was that any witnesses that we

1 designated and they counter-designate -- well, the
2 agreement we reached was we would not be deemed to have
3 rested until these witnesses that we were going to call
4 adverse in our case testified in their case. And, so,
5 the plan would have been Mr. Fadell would testify in
6 their case; we would be able to cross-examine him with no
7 limitations on scope as if we had called him adverse in
8 our case; but that was going to happen in their case.

9 THE COURT: Slow down a minute. Let me look
10 at the pretrial order here.

11 MR. SCHUTZ: Your Honor, the --

12 THE COURT: Okay. Originally -- let me ask
13 Mr. Cordell. Originally Apple agreed that they wouldn't
14 pull him out of order but you would make some
15 arrangements on the JMOL and so forth. If you're wanting
16 him out of order, why shouldn't they just go ahead and
17 question him first?

18 MR. CORDELL: The way it unfolded, your Honor,
19 is that we put our list in; they put theirs in. I don't
20 recall -- and I can't verify -- whether or not they
21 originally meant to call Mr. Fadell. But the court's
22 order, I believe, made clear that we were to call each
23 witness once and only once.

24 THE COURT: Right.

25 MR. CORDELL: And that was the genesis of our

1 agreement that they could then just call them in our
2 case.

3 The alternative that Mr. Schutz was facing at
4 the time was to actually put them on by deposition. He
5 was going to play their deposition testimony in his case;
6 and then we would have them live later in our case, I
7 believe is the way -- the situation --

8 MR. SCHUTZ: That's not --

9 THE COURT: Well, wait, wait, wait. All I'm
10 asking is that you're wanting him out of order. You had
11 agreed that actually you'd take him and they wouldn't
12 call him or they wouldn't bring him by either deposition
13 or whatever. What is the problem, if you want to bring
14 him in during the middle of their case, that they just go
15 ahead and bring him as an adverse witness and you put on
16 whatever you want to put on with him?

17 MR. CORDELL: Obviously, your Honor, we'd like
18 to present him to the jury on direct. I mean, that's --
19 we feel like the jury ought to meet the witness and
20 understand what he's all about before we get into the
21 issues that I'm sure Mr. Schutz wants to explore with
22 him.

23 He is under a consulting agreement with Apple,
24 and I'm sure Mr. Schutz is going to play that out in
25 front of the jury. I'd like them to get to know him a

1 little bit before Mr. Schutz begins to barb at him a
2 little bit.

3 THE COURT: Well, I think under these
4 circumstances, because you're in the middle of his expert
5 witness, if you want him to come -- it will have to be
6 tomorrow, right?

7 MR. CORDELL: It will be tomorrow, yes.

8 THE COURT: If you want him tomorrow, then --
9 how long do you think you're going to have him, on
10 Personal Audio's side?

11 MR. SCHUTZ: On adverse cross?

12 THE COURT: Yeah.

13 MR. SCHUTZ: Half-hour to 45 minutes, I
14 suspect.

15 THE COURT: Okay. So, we're talking about two
16 hours.

17 If you want to do that, since this is still
18 Apple's *[sic]* case-in-chief, let them call him -- or let
19 them talk to him first. It's always a danger to get
20 somebody else's witness in the middle of your case, even
21 if you wanted to call him. And then you can go ahead and
22 let him have the last good word about what a great guy he
23 is and you're telling them all the good stuff and then --
24 hopefully from your point of view, hopefully that's the
25 impression the jury will have of him as he walks out the

1 door is he's a good guy rather than after Mr. Schutz has
2 torn him to pieces.

3 MR. CORDELL: Well, let's hope, your Honor.
4 Can we have an understanding, then, that he'll follow
5 Dr. Almeroth?

6 THE COURT: Do you think he's going to be over
7 tomorrow?

8 MR. HOLDREITH: Definitely.

9 MR. SCHUTZ: The plan is to have him over
10 tomorrow. What we would like to have is Dr. Almeroth to
11 finish and then have him come before we call
12 Mr. Nawrocki. I think that will make more sense,
13 provided the time works out.

14 MR. CORDELL: I take the court's concern to
15 heart. However, I mean, if Dr. Almeroth is still on the
16 stand at noon tomorrow, perhaps we should --

17 THE COURT: Yeah. I would think that if
18 Dr. Almeroth is not through by noon, then -- or at least
19 if his direct is not through by noon -- say at 1:00 why
20 don't we have this gentleman -- and Personal Audio can
21 direct him or adverse direct him and then you can direct
22 him or cross-direct him and then he'll be allowed to
23 leave and then you can either finish up with Dr. Almeroth
24 or then we'll go into cross on Dr. Almeroth.

25 MR. CORDELL: That sounds fine, your Honor.

1 Thank you.

2 THE COURT: But I just -- I'd be stunned if
3 you can get through all of the other claims and the --
4 you've only gotten through one claim so far, right?

5 MR. SCHUTZ: That's right, your Honor, and
6 there are going to be some additional -- I'm speaking for
7 Mr. Holdreith; but in light of the issue on the 1006
8 summaries, I think we're going to be left with having
9 Dr. Almeroth at least touch upon the 150 or so exhibits
10 that support his opinion. I don't think we have any
11 choice but to at least at some level have him discuss
12 each of those exhibits because we had attempted to bypass
13 that by introducing the 1006 summaries as actual evidence
14 which --

15 THE COURT: Well, I think he's got to mention
16 the other claims.

17 MR. SCHUTZ: And he's got to mention the other
18 claims as well, yes. Yes. But we have a procedure for
19 trying to short-circuit the analysis on the other claims
20 because there's a lot of overlap in some of the other --

21 THE COURT: Well, and I've seen witnesses do
22 that, too; but I'd be just very careful about a record
23 that didn't relate evidence to claims and opinions to
24 claims. I think your record -- in fact, if I was looking
25 at an appeal from Apple's point of view, I might just let

1 them do that and see if --

2 MR. CORDELL: In retrospect, your Honor, I'm
3 wondering --

4 THE COURT: I don't know what they would do
5 honestly. I mean, I really don't. I'm concerned about
6 letting it go forward that way. I'm not --

7 MR. SCHUTZ: Well, I didn't mean to
8 short-circuit it, your Honor. What will happen is the
9 witness will walk through the other claims and the
10 elements and he will spend more time on touching each of
11 these exhibits than he might otherwise have if --

12 THE COURT: I mean, it's one thing to say, "Is
13 this the page of the nano that's similar to the page that
14 we talked about for that," "Do they say basically the
15 same thing," and then move along.

16 I mean, however you want to do it. But to
17 just not mention it at all or to say, "Yeah, there's a
18 bunch of similar stuff here. Let's move," I think that's
19 a little touchy.

20 MR. SCHUTZ: We understand that, your Honor.

21 THE COURT: Okay.

22 MR. SCHUTZ: We have a plan for dealing with
23 that.

24 THE COURT: Okay. So, at 1:00 we'll plan on
25 this witness; and that actually may be a welcome break

1 for the jury, too.

2 MR. SCHUTZ: And then just one clarification
3 on Mr. Fadell, your Honor, just so there is no
4 misunderstanding. Of course I will be cross-examining
5 him; and they will be directing him --

6 THE COURT: Uh-huh.

7 MR. SCHUTZ: -- under our normal procedure
8 which I think should apply in this case. At 7:00 they
9 need to disclose the documents they're going to use to
10 examine him. I don't have to disclose what I'm going to
11 use to cross-examine him, just as we've done with all of
12 the other witnesses. I don't see why that procedure
13 should be changed.

14 I get advanced notice of what they're going to
15 do on direct in this case.

16 MR. CORDELL: Your Honor, couldn't that be the
17 price that Mr. Schutz pays for going first? I mean,
18 that --

19 THE COURT: Well, you're asking the guy to
20 come in. I mean, it's presumably something that you want
21 for your case.

22 MR. CORDELL: We do.

23 THE COURT: And you're establishing something
24 either on invalidity or noninfringement or something
25 along that line. So, I mean, he is your witness. Go

1 ahead and disclose what's going on, and then we'll just
2 take it from there.

3 MR. SCHUTZ: Thank you, your Honor.

4 MR. CORDELL: We'll do it. Thank you, your
5 Honor.

6 THE COURT: Okay. Anything else, then, from
7 Personal Audio's point of view?

8 MR. SCHUTZ: Nothing else, your Honor. Thank
9 you.

10 THE COURT: What about from Apple's point of
11 view?

12 MR. CORDELL: No, your Honor. Thank you.

13 THE COURT: All right. In that case we are
14 through for the evening. We're in recess. I'll see you
15 tomorrow morning.

16 (Proceedings adjourned, 5:35 p.m.)

17 COURT REPORTER'S CERTIFICATION

18 I HEREBY CERTIFY THAT ON THIS DATE, JUNE 27,
19 2011, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
20 RECORD OF PROCEEDINGS.

21 
22 CHRISTINA L. BICKHAM, CRR, RMR

23

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